92-1761

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

WILLIAM D. FUGAZY,

Petitioner,

vs.

METROMEDIA COMPANY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a civil RICO case, was Petitioner's constitutionally guaranteed right to due process of law under the Fifth Amendment and the right to a jury trial under the Seventh Amendment violated where the predicate act of bankruptcy fraud was taken away from the jury by the trial judge's direction of the verdict; where the issue of "willfulness" essential to a finding of the predicate act of securities fraud was never submitted to or considered by the jury; where the jury received concededly erroneous instructions on the nature and extent of the "pattern" of criminal conduct necessary to support a civil RICO claim; and where the jury received concededly erroneous instructions on reliance and causation as an essential element of the predicate acts of mail and wire fraud?

PARTIES TO THE PROCEEDING BELOW

Petitioner:

William D. Fugazy .

Respondents:

Metromedia Company; John W. Kluge.

There are no parent companies or non-wholly-owned subsidiaries pursuant to Rule 29.1.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, dated December 17, 1992.

OPINIONS BELOW

The Order of the United States District Court for the Southern District of New York, dated December 5, 1990, is reported at 753 F. Supp. 93 and is set forth in the Appendix at 67a-81a.

The Opinion of the United States Court of Appeals for the Second Circuit dated December 17, 1992 is reported at 983 F.2d 350 and is set forth in the Appendix at 3a-37a. The Order of the Court of Appeals dated February 4, 1993 denying rehearing and rehearing *in banc* is not reported and is set forth in the Appendix at 1a-2a.

A companion case heard by the United States Court of Appeals for the Second Circuit dated December 17, 1992 was dismissed for lack of appellate jurisdiction and is published at 982 F.2d 769 and is set forth in the Appendix at 38a-54a. The Order of the United States District Court for the Southern District of New York dated February 25, 1991 is published at 124 B.R. 426 and is set forth in the Appendix at 55a-66a. The Order of the United States Bankruptcy Court dated May 14, 1990 is published at 114 B.R. 865 and is set forth in the Appendix at 115a-143a.

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals for the Second Circuit was issued on December 17, 1992. A timely petition for rehearing with a suggestion that it be heard *in banc* was denied on February 4, 1993. App. at 1a-2a. This petition is filed within ninety days of the denial of the petition for rehearing. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Seventh and Fifth Amendments to the United States Constitution and Article I, § 8, cl. 4 and Article III, § 1. App. at 149a-151a.

The statutory provisions involved are (1) The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.

§ 1961 *et seq.* (1988); (2) The Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 771(2) (1988); (3) The Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j (1988); (4) Mail Fraud, 18 U.S.C. § 1341 (1988); (5) Wire Fraud, 18 U.S.C. § 1343 (1988); (6) Bankruptcy Fraud, 18 U.S.C. § 152 (1988) and (7) the Bankruptcy Code, 11 U.S.C. § 362 (1988). App. at 151a-169a.

STATEMENT OF THE CASE

Petitioner, William D. Fugazy ("Fugazy") was an owner of a number of business concerns primarily engaged in the ground transportation business, including Fugazy International Corporation ("International"), Travelco., Inc. ("Travelco"), and Fugazy Express, Inc. ("Express").

Respondent, Metromedia Company ("Metromedia") is a large conglomerate operating a number of diversified businesses, primarily in the communications and entertainment industries with assets of approximately six hundred million ($600,000,000) dollars. John W. Kluge was chairman and chief executive officer of Metromedia until its liquidation in 1986 and is now one of two general partners and the 97.5% owner of Metromedia. Stuart Subotnick, an executive of Metromedia, is the other general partner.

The chain of events leading up to this case began in January 1985 when Metromedia expressed an interest, via a letter of intent, in purchasing Fugazy Express, a radio dispatch car business owned by Fugazy. After an audit and a due diligence investigation, Fugazy and Metromedia entered into a Stock Purchase Agreement on March 21, 1985 whereby Metromedia acquired newly issued stock representing an 80% interest in Express.

In exchange, Metromedia agreed to (1) pay two million ($2,000,000) dollars in cash to Express or others on Express'

behalf; (2) make a four million ($4,000,000) dollar subordinated loan to Express; (3) guarantee up to three million dollars ($3,000,000) in promotional advances for an automobile company to Express and to pay any default in a loan previously made by Citibank, N.A. to Fugazy in the original principal amount of three million five hundred thousand ($3,500,000) dollars.

Subsequent to the completion of this *single commercial transaction* between these two commercial entities, Express filed a voluntary petition for reorganization, in 1986, pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1100 *et seq.* In March 1987, that proceeding was converted into a Chapter 7 liquidation.

In January 1987, in an incident wholly unrelated to the aforesaid sale of Express to Metromedia, Fugazy transferred a Federal Communications Commission ("FCC") license from Express to Fugazy Limousine Limited ("Limousine"), a company owned by Fugazy's son, Roy D. Fugazy ("Roy Fugazy").[1]

The rationale for the transfer was based upon the well-settled legal principle that, once a radio license is not used — in this case due to Express' cessation of its use of the license and its permanent dismantling on December 31, 1986 — it reverts back to the public and the FCC for reissue. Notwithstanding the fact that the FCC approved Roy's application and the transfer of the license from Express to Limousine, the Bankruptcy Court voided the transfer pursuant to the automatic stay provisions found at 11 U.S.C. § 362 (1988).

In April 1987, Metromedia brought suit in the United States District Court for the Southern District of New York against Fugazy, alleging material misrepresentations and non-disclosures

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1. Metromedia eventually purchased this license along with four others for the sum of five hundred ($500) dollars. Metromedia never applied for, received or used these licenses.

in connection with the issuance of Express' stock. The allegations included violations of the 1933 and 1934 Securities and Exchange Acts, § 12(2) of the 1933 Act, 10b-5 of the 1934 Act and 10b of the 1934 Act. Metromedia also alleged common law fraud, negligent misrepresentation and breach of warranty. Fugazy and his companies responded and counterclaimed against Metromedia.

In 1989, Metromedia commenced a second action against William and Roy, alleging that they had conspired to and did engage in a pattern of racketeering activity in violation of RICO, 18 U.S.C. §§ 1962(b)-(d). The complaint alleged the predicate RICO crimes as bankruptcy fraud, in violation of 18 U.S.C. § 152 (1988); mail fraud, in violation of 18 U.S.C. § 1341 (1988); wire fraud, in violation of 18 U.S.C. § 1343 (1988); and securities fraud, in violation of Section 12(2), Section 10(b), and Rule 10b-5. Metromedia sought damages in the amount of $35,000,000, trebled pursuant to 18 U.S.C. § 1964(c). The District Court ordered the two actions consolidated.

A. The District Court Decision

Fugazy duly demanded a jury. However, the District Court failed to properly instruct the jury on four crucial issues, and thus deprived Fugazy of his Fifth and Seventh Amendment rights as guaranteed by the United States Constitution. *See NSC Int'l Corp. v. Ryan*, 531 F. Supp. 362 (D.C. Ill. 1981) (holding that civil RICO actions are legal in nature and require a jury trial on demand). The failure of the jury to hear, deliberate and decide these four issues in accordance with law tainted the entire trial process, and resulted in a gross miscarriage of justice.

First, the $46,661,792.67 (exclusive of interest) civil RICO verdict rests, in significant part, upon the trial judge's decision to issue a directed verdict against Fugazy on the predicate act of bankruptcy fraud; in effect, Fugazy was found to have committed bankruptcy fraud, in violation of 18 U.S.C. § 152 and collaterally

estopped from denying same merely because a Bankruptcy Court Judge, a non-Article III Judge[2], sitting without a jury, found that Fugazy committed a civil bankruptcy violation. The doctrine of collateral estoppel was improperly invoked. While the doctrine of collateral estoppel may be available in another type of case, in a civil RICO case with a coloration which is in part civil and in part criminal, a directed verdict cannot form the basis for a verdict. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 490 (1985).

Moreover, although the trial judge knew of the Bankruptcy Court Decision prior to trial, he issued a directed verdict at the end of trial, forcing the jury to undoubtedly conclude that all of Fugazy's witnesses were not credible. He also failed to fashion a limiting instruction to the jury to obviate such patent prejudice.

Second, in order to make out the predicate act of securities fraud in violation of Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2) as amended, a jury finding of willfulness is required. *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1325 (1992) (O'Connor, J., concurring) (RICO "unmistakably requires" that securities fraud, in order to serve as a predicate act must have been sufficiently willful to constitute a criminal violation"). However, *no* instruction on willfulness was given. App. at 89a-91a. This plain error clearly violated Fugazy's due process rights. *Cupp v. Naughten*, 414 U.S. 141, 147 (1973).

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2. U.S. Const. Art. III, § 1 provides as follows:

> . . . The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Third, in direct contravention of this Court's opinion in *H.J. Inc. v. Northwestern Bell Telephone*, 492 U.S. 229 (1989), the District Judge improperly charged the jury on the requisite elements of a "pattern of racketeering" necessary to support a civil RICO judgment. Notwithstanding this Court's ruling that the alleged racketeering acts must extend over "a substantial period of time," the Judge charged that a few weeks or months was all that was necessary to establish a pattern. App. at 98a.

Finally, in charging the jury on the predicate acts of mail and wire fraud, the trial judge failed to instruct the jury that a "causal connection" was necessary to establish that statements made by Fugazy were in fact relied upon by Metromedia.

The jury's verdict, although a close one,[3] found that Fugazy had committed bankruptcy fraud, mail fraud, wire fraud and securities fraud and that Fugazy had violated the civil racketeering statute. The jury awarded Metromedia damages of $15,553,930.89 which, when trebled pursuant to 18 U.S.C. § 1964(c), amounted to $46,661,712.67.

Thereafter, defendants moved for judgment n.o.v. or, alternatively, for a new trial. In support of the former, Fugazy argued, *inter alia*, that securities fraud could not constitute a RICO predicate unless the violation was willful, and the jury was not instructed as to the need to find willfulness; and that the allegations of securities fraud, mail fraud, and wire fraud as RICO predicates should have been dismissed for lack of causation because there was no evidence of reliance by Metromedia. Defendants also

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3. In many respects this was a close jury case. The jury decided a number of issues in defendants' favor. For example, with respect to the 10 b-5 claim, the 12(2) claim, the common law fraud claim and the negligent misrepresentation claim, the jury unanimously found in favor of defendants Travelco, International and Roy Fugazy, and in favor of Roy Fugazy on the RICO claim. Likewise, the jury found in favor of Fugazy with respect to the 10 b-5 claim, the common law fraud claim as well as the negligent misrepresentation claim. App. at 106a-114a.

argued that the court's instructions to the jury with respect to the RICO claims were erroneous.

In an Opinion dated December 5, 1990, and published at 753 F. Supp. 93, the District Court denied both motions. App. at 67a-81a.

While acknowledging that defendants were correct in their contention that willfulness was a prerequisite for use of a 12(2) claim and conceding its charges on pattern were improper, the District Court still concluded that "prejudicial error had not crept into the record." App. at 73a.

B. The Court of Appeals' Decision

In the appeal from the District Court's Order, Fugazy argued that the trial judge's lack of instruction on the issue of willfulness and his erroneous instructions to the jury regarding pattern and causation and reliance, coupled with the fact that the issue of bankruptcy fraud was taken away from the jury by the trial judge, denied Fugazy a full and fair trial by jury.

Although the Court of Appeals conceded that there were errors throughout the trial, and that the trial judge charged the jury improperly with respect to willfulness, pattern, and causation and reliance, the Court of Appeals nonetheless affirmed the District Court's Decision. App. at 6a. The Court of Appeals concluded that these errors were not prejudicial and did not reflect a substantial injustice which would require a new trial or reversal of the District Court's decision. App. at 37a. In doing so, however, the Court of Appeals improperly and excessively exceeded its scope of review. *Austin v. Torrington Co.*, 810 F.2d 416 (4th Cir.), *cert. denied*, 484 U.S. 477 (1987) (appellate review of denial of a motion for a new trial should not involve contrasting evidence, judging credibility of witnesses or substituting the court's judgment of facts for those of the jury).

With respect to the companion case, Fugazy appealed the Bankruptcy Court's Decision that Fugazy had improperly transferred the license in violation of 11 U.S.C. § 362 (1988).[4] Fugazy argued that since a radio license reverts to the FCC upon cessation of use, it was not an asset of the estate and that it was, therefore, error to conclude that a bankruptcy fraud had occurred. Fugazy cited a letter from the FCC which confirmed this fact. App. at 170a-172a. *See* 47 C.F.R. § 90.157 (1990); *Edward B. Mulrooney,* 13 F.C.C. 2d 946, 947 (1968). Holding that the Bankruptcy Court Order was not final, the Second Circuit Court of Appeals dismissed the appeal for lack of appellate jurisdiction.[5]

On February 4, 1993, the Second Circuit denied Fugazy's petition for rehearing with the suggestion for rehearing *in banc.*

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4. That section imposes an automatic stay on assets of the bankruptcy estate upon the commencement of a bankruptcy proceeding.

5. The Court of Appeals held that the Bankruptcy Court's Decision was not final for appeal purposes yet, was final enough for collateral estoppel purposes. There now exists the possibility that, once the bankruptcy order is appealed from a finding that Fugazy committed bankruptcy fraud may be reversed. If that decision is indeed reversed on appeal, then Fugazy will then have been held to have committed a RICO predicate act and in fact collaterally estopped from defending such act when in fact a bankruptcy fraud had not even occurred.

REASONS FOR GRANTING THE WRIT

By upholding a $46,661,792.67 civil RICO judgment, exclusive of interest, based upon a myriad of acknowledged improper instructions to the jury and upon a patently prejudicial directed verdict of bankruptcy fraud, the court below effectively denied Fugazy his constitutionally guaranteed right to due process of law under the Fifth Amendment and the right to a jury trial under the Seventh Amendment.

Further, this petition presents this Court with an opportunity to define the parameters of civil RICO and resolve the confusion among the circuits that has generated since this Court's decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

Despite this Court's efforts to provide uniform guidance as to the precise meaning of "pattern of racketeering" — an essential component and the heart of a civil RICO claim —, the federal courts of appeals remain divided as to what specific facts rise to the level of a pattern.[6]

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6. For example, since *H.J., Inc.*, courts are still divided as to whether a single fraudulent scheme is sufficient to form a pattern. *See, e.g. Apparel Art International Inc. v. Jacobson*, 967 F.2d 720 (1st Cir. 1992) (commission of several underlying predicate acts as part of a single effort to defraud Defense Dept. did not rise to the level of a pattern); *Midwest Grinding Company Inc. v. Spitz*, 976 F.2d 1016 (7th Cir. 1992) (one-shot scheme that lasted nine months insufficient to meet pattern requirement); *J.D. Marshall International Inc. v. Redstart, Inc.*, 935 F.2d 815 (7th Cir. 1991) (a single scheme involving a single victim, predicated upon a single transaction lasting 13 months was a commercial dispute between two parties, not a pattern of racketeering injury); *but see United States v. Coiro*, 922 F.2d 1008 (2d Cir.), *cert denied*, 111 S. Ct. 2826 (1991) (single scheme sufficient); *Kehr Packages Inc. v. Fidelcor, Inc.*, 926 F.2d 1406 (3d Cir.), *cert. denied*, 111 S. Ct. 2839 (1991) (single scheme may give rise to RICO liability — however if scheme is limited both in time and number of victims, continuity must be proven).

Moreover, the decision below conflicts with this Court's own precedent and the decisions of federal courts of appeals; while the lower courts await guidance as to the precise definition of "pattern of racketeering," this Court settled the notion that predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. Yet, the jury's verdict was based upon an improper charge that a few weeks or months was all that was necessary to establish a pattern — a clear departure from this Court's precedent.

I.

PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHTS TO A TRIAL BY JURY AND TO DUE PROCESS OF LAW WERE VIOLATED WHEN THE PREDICATE ACT OF BANKRUPTCY FRAUD WAS TAKEN AWAY FROM THE JURY BY THE TRIAL JUDGE'S DIRECTION OF THE VERDICT BASED ON A PRIOR ADJUDICATION BY A BANKRUPTCY JUDGE — A NON-ARTICLE III JUDGE — SITTING WITHOUT A JURY.

At the end of the case, the trial judge took the issue of bankruptcy fraud out of the hands of the jury. He directed the verdict in this regard, relying on the doctrine of collateral estoppel. Consequently, a prior adjudication in Bankruptcy Court in a different dispute was given conclusive effect by the trial judge in support of the later RICO claim. App. at 99a.

The bankruptcy judge had no subject matter jurisdiction to hear and decide the RICO claim. *See Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990); *Barnett v. Stern*, 909 F.2d 973 (7th Cir. 1990). The trial judge, by invoking the doctrine of collateral estoppel, removed the determination of whether the

predicate act of bankruptcy fraud (as defined by 18 U.S.C. § 152) occurred from the purview of the RICO jury. In effect, the trial judge *impermissibly* delegated his Article III judicial powers to the Bankruptcy Judge, an Article I judge,[7] whose supposed finding of "bankruptcy fraud" ultimately served as a predicate act of the RICO claim. *See Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), holding the jurisdictional provision of the 1978 Bankruptcy Reform Act unconstitutional because it impermissibly vested Article III judicial powers in bankruptcy judges. By virtue of this improper delegation of judicial power, and the reliance by the trial judge upon the findings of the bankruptcy judge, Petitioner lost his constitutional right to have a jury decide all factual predicates of his RICO claim, a right afforded to him by virtue of the Seventh Amendment of the United States Constitution and Rule 38 of the Federal Rules of Civil Procedure, as well as his right to have all issues tried by an Article III judge.

In 1984, Congress responded to the Supreme Court's decision in *Marathon* with a new jurisdictional provision, now codified at 28 U.S.C. § 157. Pursuant to 28 U.S.C. § 157, a Bankruptcy Court has the power to "hear and determine all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11." *See* 28 U.S.C. § 157(b)(1). A bankruptcy judge may hear a non-core proceeding and make proposed findings of fact and conclusions of law to the district court, but he may not enter a final order of judgment. *See* 28 U.S.C § 157(c)(1). In *Matter of Wood*, 825 F.2d 90 (5th Cir. 1987), *on remand to In Re Wood*, 84 B.R. 432

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7. U.S. Const. art. 1, § 8, cl. 4, states in pertinent part as follows:

> The Congress shall have power . . . [t]o establish . . . Uniform Laws on the subject of bankruptcies throughout the United States . . . .

(S.D. Miss. 1988), the court concluded that "a proceeding is core under Section 157 if it invokes a substantive right provided by Title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy proceeding." *Id.* at 97.

It is clear that the RICO claim asserted by the Petitioner would not have had "core" status. The RICO claim does not invoke a substantive right provided by Title 11, nor does it arise only in the context of bankruptcy proceedings. The RICO claim invokes a completely independent federal right, and is precisely the kind of claim that this Court in *Marathon* said Congress could not commit to the bankruptcy court for resolution. The reliance by the trial court on the resolution of the bankruptcy fraud issue by the bankruptcy court runs afoul of the holding in *Marathon*. Therefore, the jury in the RICO case should have been instructed to decide the bankruptcy fraud issue anew.

While the doctrine of collateral estoppel may have been available in another type of case, in a civil RICO case, it is entirely wrong. Moreover, by directing the verdict at the end of the case the trial judge in effect told the jury that Fugazy and his witnesses were liars, thus tainting the whole case against him.

Significantly, the Bankruptcy Court *never* made a finding that Petitioner committed bankruptcy fraud under 18 U.S.C. § 152, a crime over which it has no subject matter jurisdiction. *See Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). In order to convict under this criminal statute, it must be shown that the actor "knowingly *and* fraudulently" transferred property out of the bankrupt's estate. A material element of proof of fraudulent intent under the criminal bankruptcy fraud statute is an intent to harm and therefore there can be no conviction where the transfer complained of was made in good faith or because of ignorance or mistake. *In re Jartran, Inc.*, 44 B.R. 331 (Bkrtcy. Ill. 1984). Petitioner's subjective good faith belief (whether correctly

or incorrectly held) that (i) the license was not property of the estate by virtue of its cancellation in December 1986, and therefore his efforts to aid its reissuance to a third party could not "harm" a creditor who was not otherwise entitled to it, or (ii) that the license had no value and likewise its transfer could not harm a creditor, could negate any showing of a subjective intent to harm and therefore preclude a finding of criminal bankruptcy fraud. The jury was never given the opportunity to deliberate on Petitioner's state of mind because the bankruptcy fraud issue was taken away from it by virtue of the District Court's direction that the criminal act of "bankruptcy fraud" had been conclusively established by the Bankruptcy Court. App. at 12a.

However, the Bankruptcy Court never considered the applicability of the criminal bankruptcy fraud statute and its attendant state of mind requirement during its proceedings. The Bankruptcy Court made a civil finding that Petitioner's purported transfer of the license was a "willful contravention" of the automatic stay provisions contained in 11 U.S.C. § 362 of the Bankruptcy Code, therefore entitling Respondent, Metromedia, to monetary sanctions for actual damages, if any, pursuant to 11 U.S.C. § 362(h) and a voiding of the purported transfer pursuant to 11 U.S.C. § 549. *Matter of Fugazy, Inc.*, 114 B.R. 865, 875 (Bkrtcy. S.D.N.Y. 1990). The willfulness requirement supporting recovery of damages under § 362(h) for violation of the stay is demonstrated by *any* "deliberate" act taken in violation of the automatic stay, which the violator knows to be in existence. *See In re Crysen/ Montenary Energy Co.*, 902 F.2d 1098 (2d Cir. 1990). Unlike the criminal bankruptcy fraud statute, under 11 U.S.C. § 362(h), once a person has been found to have "deliberately" violated the automatic stay provision (*i.e.*, a specific intent to transfer property), there is no additional finding to be made that the person had the requisite intent to harm a creditor. Hence, Petitioner's good faith beliefs as to harm, although materially relevant under 18 U.S.C. § 152, are utterly irrelevant under 11

U.S.C. § 362(h). This is manifest by the very factual findings which served as the underpinning of the Bankruptcy Court ruling that Petitioner willfully violated the automatic stay provision. On September 10, 1987, the Bankruptcy Court entered a consent order wherein Petitioner conceded only that he *acted without authority* in attempting to assign and transfer Express' interest in the license to a third party, and that the attempt to transfer was null and void. *See Matter of Fugazy, Inc.*, 114 B.R. 865, 867 (Bkrtcy. S.D.N.Y. 1990). App. at 146a. No finding or concession was made that Petitioner also intended to harm a creditor by his concededly unauthorized act and nowhere does the Bankruptcy Court purport to address whether at any time Petitioner formulated the requisite subjective intent to harm the creditor.

Regardless of whether it is necessary to prove a RICO predicate by preponderance of the evidence or beyond a reasonable doubt, it is clear that the requisite state of mind needed to commit bankruptcy fraud is far different than the state of mind needed to show a mere violation of the automatic stay provision. For this reason, the issue of whether bankruptcy fraud was committed under 18 U.S.C. § 152 was not *identical* nor *necessary* or *essential* to any issue decided by the Bankruptcy Court in the previous bankruptcy proceeding. Two of the essential elements which must be present for the successful application of collateral estoppel are that the determination in the second forum must be necessary and essential to the judgment which is rendered by, and in, the first forum and the issue before the second forum must be identical as the one in the first forum. *See Restatement of Judgments 2d*, § 27 at 250; *N.L.R.B. v. Donna Lee Sportswear Co., Inc.*, 836 F.2d 31, 33 (1st Cir. 1987). Neither element is present here.

Petitioner was constitutionally entitled to have the jury determine whether his good faith beliefs, attested to at the trial (App. at 170a-172a), negated the requisite state of mind needed to show bankruptcy fraud. This issue was never addressed nor could

have been addressed at the Bankruptcy Court. Since identity of issues is an element that must be met in order to apply collateral estoppel, the doctrine when improvidently applied in the RICO trial resulted in plain error and thereby deprived Petitioner of his constitutional right to trial by jury.

II.

PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHTS TO A TRIAL BY JURY AND TO DUE PROCESS OF LAW WERE VIOLATED BY THE DISTRICT COURT'S FAILURE TO INSTRUCT THE JURY AS TO THE NECESSITY OF FINDING WILLFULNESS TO SUSTAIN THE PREDICATE ACT OF SECURITIES FRAUD.

In *Sedima*, this Honorable Court raised and left open the question whether a plaintiff in a civil RICO case is obligated to prove his or her case by a preponderance of the evidence — a civil standard of proof — or beyond a reasonable doubt — a criminal standard. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Whether civil or criminal, one thing is clear, as a matter of established law, in order to sustain a finding of securities fraud which serves as a predicate act there must be a finding of "willfulness." Although RICO Section 1964(c) creates a civil cause of action, "the racketeering activity giving rise to RICO liability must be criminal in nature." *Klein v. King*, (1990) Fed. Sec. L. Rep. (CCH) ¶ 95,002 (N.D. Cal. Mar. 26, 1990) (observing that " 'racketeering activity' is defined (in Section 1960(1) [as including traditional state law crimes . . . acts 'indictable' under federal laws . . . and other federal 'offenses']"); *cf. H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) (noting, *inter alia*, that predicate acts must "pose a threat of continued *criminal* activity," that "Congress was concerned with long-term *criminal* conduct," and that "Congress drafted RICO broadly enough to encompass a wide range of *criminal* activity" (emphasis added)).

To be criminal, conduct must be committed with the *mens rea* appropriate to the offense. In order to establish liability under Section 12(2), the plaintiff must prove that the defendant acted with the appropriate *mens rea*. *See, e.g., Holmes v. Securities*

Investor Protection Corp., 112 S. Ct. 1311, 1325 (1992) (O'Connor, J. concurring) (RICO "unmistakably requires" that securities fraud, in order to serve as a predicate act, must have been "sufficiently willful to constitute a criminal violation"); *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 29 & n.4 (2d Cir. 1983) (imposing criminal liability under 12(2) only for violations that are "willful.").

However, *no instruction as to the need to find willfulness was ever given.*

The Court of Appeals improperly exceeded its scope of review and decided, based on its "own interpretation of the record," there was not reversible error. For example, while conceding error at the trial level, the Court of Appeals noted that "had the jury been so instructed . . . it could easily have found that William's [Fugazy's] violation was willful." App. at 26a.

The point is that the jury *did not* draw these inferences and, under the instructions given, *could not* have done so. This action by the court, here again, substituted its judgment for the verdict of a jury. *See Austin v. Torrington Co.*, 810 F.2d 416 (4th Cir. 1987); *Hutchinson v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992). This was error because the issue of willfulness is one that is so crucial that it should have been left in the hands of the jury.

This was also prejudicial for other reasons. First, the jury in this case decided a number of issues in defendants' favor. For example, with respect to the 10 b-5 claim, the 12(2) claim, the common law fraud claim, claims that involve a scienter or willfulness requirement, the jury unanimously found in favor of defendants Travelco, International and Roy Fugazy, and in favor of Roy Fugazy on the RICO claim. Second, the jury found in favor of Fugazy with respect to the 10 b-5 claim and the common law fraud claim both of which involve scienter as a precondition to liability. App. at 106a-114a.

There can be no doubt that in these circumstances, the failure to properly instruct could easily have tilted the jury, acting without appropriate legal criteria, against Fugazy on the civil RICO violation. Moreover, the fact that this jury found that Fugazy was not even negligent in connection with the misrepresentations at issue, logically dictates that had this same jury been properly charged, they could well have found that he did not willfully make any misrepresentations. This is manifest injustice which requires the award of a new trial. *See City of Newport v. Fact Concerts Inc.*, 453 U.S. 247 (1981).

III.

THE DISTRICT COURT'S CONCEDEDLY ERRONEOUS INSTRUCTIONS ON "PATTERN OF RACKETEERING" RESULTED IN PREJUDICIAL ERROR AND, IN COMBINATION WITH ITS OTHER ERRORS IN THE HANDLING OF THE JURY, DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

The Racketeer Influenced and Corrupt Organization Act ("RICO") permits "any person injured in his business or property," by "a pattern of racketeering activity, "[8] to obtain treble damages. 18 U.S.C. § 1961 *et seq.* "The heart of any RICO complaint is the allegation of a pattern of racketeering." *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987). To prove a "pattern of racketeering activity," one must show separate predicate acts that (i) are "related," and (ii) "amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). Although RICO Section 1964(c) creates a civil cause of action, "[c]ongress was concerned with long-term *criminal* conduct." *Id.* at 242. (emphasis added).

In attempting to decipher RICO's pattern requirements this Court noted that it is the factor of "continuity plus relationship" which combines to produce a pattern. *Id.* at 251. The concept of "continuity" is either a "closed period of repeated conduct," or an "open period of past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 253. According to the Court, closed-ended continuity may be demonstrated with proof of a "series of related predicates extending over a substantial period

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8. "Pattern of racketeering" as defined by 18 U.S.C. § 1961 requires at least two acts of racketeering activity.

of time," but "predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." *Id.*

The trial court's pattern instruction to the jury was erroneous precisely because, in direct contrast to the observations of this Court, and over specific objection of Fugazy's trial counsel, (App. at 101a-102a), *the jury was instructed that predicates extending over a few weeks or months was all that was necessary to establish the requisite pattern.* Hence, the jury was instructed that a pattern could be found when in fact there was none as a matter of law. App. at 98a.

The Court of Appeals compounded the error by recognizing the trial court's error but deeming it harmless. App. at 36a-37a. Despite the erroneous instruction, the Court of Appeals embarked upon its own analysis and improperly substituted its own judgment for that of the jury. *See Diamonds Plus Inc. v. Kolber,* 960 F.2d 765, 769 (8th Cir. 1992) (holding that it is well-settled that the existence of a RICO "pattern of racketeering" is a question of fact for the jury). According to the Court of Appeals, despite the erroneous instruction to the jury, a pattern was, in fact, established merely because the four predicate acts of mail fraud, wire fraud, securities fraud and bankruptcy fraud occurred over a period of one-and-one-half years. In doing so, the court wholly ignored the "relatedness" issue, which requires that predicate acts extending over a substantial period of time must be "related." *Id.* at 242. The mail fraud, wire fraud and securities fraud predicates did not by themselves meet the "continuity" requirement because, although possibly "related" by virtue of describing underlying actions intended to consummate the sale of Express, they occurred only over a few weeks or months, with no proof that there was a threat of continued fraud after issuance of the shares purchased. Assuming *arguendo* Fugazy engaged in mail, wire and securities fraud, these frauds commenced in January 1985, when Metromedia signed a letter of intent and received from Express financial statements, and

ceased on March 21, 1985, when the purchase was consummated — a span of only three months' time. And once Metromedia purchased Express, where was the threat of continuing criminal activity? In order for the Court of Appeals to find a "pattern of racketeering activity," it was necessary to append the wholly unrelated bankruptcy fraud, which occurred one-and-one-half years after the other fraud claim. The bankruptcy fraud, unlike the other fraud claim, had nothing to do with inducing Respondent Metromedia to purchase shares in Express. This was simply an effort to transfer an asset of nominal value to a third party while Express was in bankruptcy.

Clearly, the bankruptcy fraud was *not* part of the conduct aimed at securing the share purchase, and it took place more than a year later. This conduct was "too unrelated — too separate — too distinct" to permit a finding that, when taken together with the earlier acts, it is part of a "racketeering pattern." *Apparel Art International Inc. v. Jacobson*, 967 F.2d 720, 724 (1st Cir. 1992). (fraudulent conveyance of assets, occurring several years after earlier frauds is too unrelated to earlier frauds to permit finding of racketeering pattern.)

Nevertheless, according to the Court, the bankruptcy fraud extended the "pattern of racketeering activity" over a substantial period of time, and was material to finding "continuity" and hence "pattern." However, no instruction was ever given to the jury that in order to find a "pattern of racketeering activity" it *must* include the bankruptcy fraud. App. at 97a. This in turn would *require* the jury to determine that the bankruptcy fraud was "related" to the other fraud. The jury was merely instructed on the meaning of "relatedness" and it was left to flounder on its own to determine whether the bankruptcy fraud was sufficiently related to the other fraud claim to be part of the pattern.

The failure of the trial judge to impart to the jury the significance of the bankruptcy fraud to the "pattern" requirement or that "pattern" could not be established without it was not harmless, because if, in fact, the jury determined that the bankruptcy fraud was unrelated to the other fraud claim it could have wholly disregarded it (in direct conflict with the Court's own pronouncement that a "pattern" could not be made out without it) but still find a "pattern of racketeering activity" with respect to the other fraud claim because of the belief, as erroneously instructed, that continuity could be established only over a "few weeks and months."[9]

Hence, the verdict as it now stands is a hybrid creature, consisting partially of fact finding by a jury given erroneous instructions and partially of fact finding by the Court of Appeals. This is why the function of the jury has been usurped by the court. *See Austin v. Torrington Co.*, 810 F.2d 416(4th Cir.), *cert. denied*,

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9. *See Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (regarding the standard for determining when an error in a jury instruction requires reversal, this Court has stated that "if one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected . . ."); *Williams v. U.S. Elevator Corp.*, 920 F.2d 1019, 1022-23 (D.C. Cir. 1990) (same); *Aetna Casualty and Sur. Co. v. Gosdin*, 803 F.2d 1153, 1159 (11th Cir. 1986) (Same); *but see U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1252-53 & n. 39 (10th Cir. 1988) (standard of review for harmless error in civil case "is whether the substantial rights of the parties were more probably than not unaffected by the error"); *Smith v. Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 389 (7th Cir. 1985) (same); *McIlroy v. Dittmer*, 732 F.2d 98, 105 (8th Cir. 1984) (same); *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983) (same). Under the harmless error standard enunciated by the Circuit Courts, in light of the possibility that the jury could have disregarded the bankruptcy fraud in finding the requisite "pattern", it cannot be said with fair assurance that the judgment was not "substantially swayed" by the error or that it was more probable than not that substantial rights remained unaffected by the error, thereby resulting in harmful error.

484 U.S. 977 (1987). There is absolutely no assurance that the jury based its judgment on anything other than the short-term activity represented by the mail, wire and securities fraud.

Given the fact that RICO is a statute which is concerned with "long-term criminal conduct," resulting in corresponding heavy penalties imposed by the statute, as well as the stigma and public ignominy associated with being labelled a racketeer, if it was possible for the fact finder to rest its decision on only *short-term* conduct, which is not reached by the provisions of RICO, the Petitioner has been denied due process of law in violation of the Fifth Amendment to the United States Constitution and his right to a fair jury trial in violation of the Seventh Amendment of the United States Constitution.

IV.

THE FAILURE OF THE DISTRICT COURT TO PROPERLY INSTRUCT THE JURY ON RELIANCE AND CAUSATION, ESSENTIAL ELEMENTS OF THE PREDICATE ACTS OF MAIL AND WIRE FRAUD, RESULTED IN PREJUDICIAL ERROR AND, IN COMBINATION WITH ITS OTHER ERRORS IN THE HANDLING OF THE JURY, DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

The Court of Appeals' Opinion correctly acknowledges that in order to make out the predicate acts of mail fraud and wire fraud essential to support the civil RICO violations here, it was necessary to establish the requisite causal connection and that Fugazy's misrepresentations were relied upon by Metromedia. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990); *Brandenberg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988). App. at 34a. The Court of Appeals conceded that proper instructions on reliance were not given. *This was plain error.* Fugazy's trial counsel specifically requested a legally correct instruction and such request was flatly denied. The jury was left to flounder on its own. The Court of Appeals disposed of this error as harmless, concluding that the record contains sufficient evidence to support a finding of the requisite reliance, thus, once again, incorrectly substituting its judgment for the verdict of the jury. *See Austin v. Torrington Co.*, 810 F.2d 416 (4th Cir. 1987); *Hutchinson v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992).

While Justice Scalia in his concurring opinion in *H.J. Inc.*, 492 U.S. 229, 256 (1989) raises the specter of an eventual constitutional challenge to RICO,[10] we in this petition, do not

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10. "That situation (the lack of uniformity in the lower courts' effort to articulate "the content of this law") is bad enough with respect to any statute, but (Cont'd)

mount such an attack. However, *as applied to Petitioner*, a $46,661.792.67 civil RICO judgment, exclusive of interest and non-dischargeable in bankruptcy, rendered in circumstances as stated herein, violated Petitioner's rights under the Fifth and Seventh Amendments to the United States Constitution. When you combine the serious errors in the trial judge's charge to the jury, it is manifest that Petitioner was deprived of the full and fair deliberation of a jury of his peers in accordance with law.

(Cont'd)

it is intolerable with respect to RICO . . . [C]larity and predictability in RICO's civil applications are particularly important; but it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for ciminal laws . . . *No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.*" (Emphasis added). *Id.* at 256.

CONCLUSION

We respectfully request that this Court grant certiorari and reverse the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC FILED FEBRUARY 4, 1993

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of February, one thousand nine hundred and ninety-three.

DOCKET NUMBER: 91-7049

METROMEDIA COMPANY,

Plaintiff-Appellee,

V.

WILLIAM D. FUGAZY, ET AL.,

Defendants-Appellants.

WILLIAM D. FUGAZY, ET AL.

Third-Party
Plaintiffs-Appellants,

V.

JOHN W. KLUGE,

Third-Party
Defendant-Appellee.

Appendix A

METROMEDIA COMPANY,

Plaintiff-Appellee

V.

WILLIAM D. FUGAZY, SR.,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellants and Third-Party Plaintiffs-Appellants, William D. Fugazy, Travelco, Inc. and Fugazy International Corporation.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
Clerk
s/ Kathleen Brovnie
Operations Mgr.

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 17, 1992

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1120 August Term, 1991
(Argued: April 24, 1992 Decided: December 17, 1992

Docket No. 91-7049

METROMEDIA COMPANY,

Plaintiff-Appellee,

-v.-

WILLIAM D. FUGAZY, TRAVELCO, INC., FUGAZY INTERNATIONAL CORPORATION, ROY D. FUGAZY,

Defendants,

WILLIAM D. FUGAZY, TRAVELCO, INC., FUGAZY INTERNATIONAL CORPORATION,

Defendants-Appellants.

WILLIAM D. FUGAZY, TRAVELCO, INC., FUGAZY INTERNATIONAL CORPORATION, ROY D. FUGAZY,

Third Party Plaintiffs,

Appendix B

WILLIAM D. FUGAZY, TRAVELCO, INC., FUGAZY INTERNATIONAL CORPORATION,

Third Party Plaintiffs-Appellants,

-v.-

JOHN W. KLUGE,

Third Party Defendant-Appellee.

METROMEDIA COMPANY,

Plaintiff-Appellee,

-v.-

WILLIAM D. FUGAZY, SR. and ROY D. FUGAZY,

Defendants,

WILLIAM D. FUGAZY, SR.,

Defendant-Appellant.

Before: OAKES*, KEARSE, and WALKER, *Circuit Judges.*

Appeal from so much of a final judgment entered in the United States District Court for the Southern District of New York, Robert L. Carter, *Judge,* as awarded plaintiff a total of $46,661,792.67 on claims under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2), the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, and common law.

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* Judge Oakes was Chief Judge until July 1, 1992.

Affirmed.

MARTIN I. SHELTON, New York, New York (Peter C. Neger, Mary Gail Gearns, Shea & Gould, New York, New York, on the brief), *for Plaintiff-Appellee and Third-Party-Defendant-Appellee.*

ANTHONY PRINCI, New York, New York (Steven Cooper, Jordan W. Siev, Anderson Kill Olick & Oshinsky, P.C., New York, New York, on the brief) *for Defendants-Third-Party-Plaintiffs-Appellants.*

KEARSE, *Circuit Judge:*

Defendants-third-party-plaintiffs William D. Fugazy ("William") or "William Fugazy"), Travelco, Inc. ("Travelco"), and Fugazy International Corporation ("International") appeal from so much of a final judgment, entered in the United States District Court for the Southern District of New York following a jury trial of consolidated actions before Robert L. Carter, *Judge*, as awarded plaintiff Metromedia Company ("Metromedia") a total of $46,661,792.67 in damages. The award included $15,553,930.89 on Metromedia's claim against William Fugazy, Travelco, and International for breach of warranty, the same amount against William on a claim under § 12(2) of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 771(2) (1988), and $46,661,792.67 in treble damages against William for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (1988). On appeal, appellants contend that the district court improperly deprived them of a jury trial on the

breach-of-warranty claim; William contends that Metromedia's other claims should have been dismissed as a matter of law and that the trial court erred in its instructions to the jury with respect to the fraud and RICO claims. For the reasons below, we reject appellants' contentions and affirm the judgment of the district court.

I. BACKGROUND

At all pertinent times, William Fugazy was, directly or indirectly, the owner of a number of concerns engaged in the ground transportation business, including International, Travelco, and Fugazy Express, Inc. ("Express"). He owned all of the stock of International, a holding company for the other Fugazy companies. International owned 100% of Travelco and 60% of Express; Travelco owned the remaining 40% of Express. William was president of Travelco and International; he was chairman of the board of directors of Express.

Metromedia, noncorporate successor-in-interest in 1986 to Metromedia, Inc., was a large conglomerate operating a number of diversified businesses, primarily in the communications and entertainment industries, and had assets of approximately $600,000,000. Third-party-defendant John W. Kluge was chairman and chief executive officer of Metromedia, Inc., until its liquidation, and in 1986 he became a general partner and 97.5% owner of Metromedia. Stuart Subotnick, an executive of Metromedia, Inc., was Metromedia's other general partner.

A. The Investment in and Bankruptcy of Express

In December 1984, the Fugazy companies were in dire need of capital, and William asked his then-friend Kluge to consider

having Metromedia purchase an interest in one or more of them. In January 1985, Kluge asked Subotnick to sign a letter of intent expressing an interest in purchasing Express, a radio-dispatched car business. After signing such a letter, Subotnick and his staff began to explore the financial viability of Express, and conducted, *inter alia*, an audit, a market analysis, and a "due diligence" investigation.

Subotnick returned to Kluge with a report that, though "optimistic" about Express, advised against the acquisition because Subotnick believed "this was not the kind of business we should be in." Kluge responded by having Subotnick inform William that Metromedia would not purchase Express. William urged Kluge to reconsider, however, and after additional analysis Subotnick and his staff concluded that Express was a potentially sound acquisition that could be made profitable with expanded operations and improved management.

As a result, on March 21, 1985, Metromedia and appellants entered into a Stock Purchase Agreement ("Agreement") pursuant to which Metromedia acquired newly issued common stock representing an 80% interest in Express. In exchange, Metromedia agreed principally to (1) pay $2,000,000 cash to Express or others on Express's behalf, (2) make a $4,000,000 subordinated loan to Express, (3) guarantee up to $3,000,000 in promotional advances from an automobile company to Express, and (4) cure any default on a loan previously made by Citibank, N.A., to William ("Citibank loan") in the original principal amount of $3,500,000. As discussed in greater detail below, the Agreement contained a section entitled "Representations and Warranties of Express and the Stockholders" with respect to, *inter alia*, Express's outstanding contracts, its exposure to pending or threatened litigation, and its financial condition.

Appendix B

In July 1986, Express filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.* (1988). In March 1987, the proceeding was converted into one under Chapter 7 for liquidation, 11 U.S.C. § 701 *et seq.* (1988). In the course of the bankruptcy proceeding, Metromedia discovered that in or about January 1987, William had transferred one of Express's assets, to wit, a Federal Communications Commission ("FCC" or "Commission") license and two radio frequencies (collectively "License"), to Fugazy Limousine Limited ("Limousine"), a company owned by William's son, defendant Roy D. Fugazy ("Roy" or "Roy Fugazy"). William had transferred the asset without notice to or permission from the bankruptcy court, and without consideration. Limousine had then obtained approval of the transfer from the FCC by failing to inform the FCC that Express was in bankruptcy. Eventually, in a Memorandum Decision dated May 14, 1990, and filed on May 15 ("Bankruptcy Court Decision"), the bankruptcy court ruled that William had improperly transferred the license "in direct, willful contravention" of the automatic stay imposed at the commencement of the bankruptcy proceeding, *see* 11 U.S.C. § 362 (1988), and it ordered, *inter alia*, that William pay attorneys' fees to the bankruptcy trustee. *Matter of Fugazy Express, Inc.*, 114 B.R. 865 (Bankr. S.D.N.Y. 1990), *aff'd*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed for lack of jurisdiction*, Nos. 92-5005, -5007 (2d Cir. Dec. 17, 1992).

B. The Present Actions

In April 1987, Metromedia commenced the first of the present actions, asserting claims against William, International, Travelco, and Roy Fugazy for misrepresentations and nondisclosure of material facts in connection with the issuance of the Express stock, in violation of, *inter alia*, § 12(2) of the 1933 Act, § 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j

(1988), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, along with claims of common-law fraud, negligent misrepresentation, and breach of warranty. It sought, *inter alia,* $35,000,000 in compensatory damages and $250,000,000 in punitive damages. Defendants asserted various counterclaims against Metromedia and brought third-party claims against Kluge, contending, *inter alia,* that he had entered into written agreements entitling them to contribution or indemnification for any judgment Metromedia might recover against them.

In 1989, Metromedia commenced a second action against William and Roy, alleging that they had engaged in, and conspired to engage in, a pattern of racketeering activity in violation of RICO, 18 U.S.C. § 1962(b)-(d). The complaint alleged that the predicate RICO crimes were bankruptcy fraud, in violation of 18 U.S.C. § 152 (1988); mail fraud, in violation of 18 U.S.C. § 1341 (1988); wire fraud, in violation of 18 U.S.C. § 1343 (1988); and securities fraud, in violation of § 12(2), § 10(b), and Rule 10b-5. It sought damages in the amount of $35,000,000, trebled pursuant to 18 U.S.C. § 1964(c). The district court ordered the actions consolidated.

Prior to trial, the court issued a "Joint Consolidated Pre-Trial Order" ("Pretrial Order") itemizing, *inter alia,* facts that the parties agreed were not in dispute. In it, defendants admitted that as of the date of the Agreement, (1) there were at least six litigations pending against Express or companies for which Express could be held liable, (2) that Express had entered four confessions of judgment, (3) that Express and/or William were in default on certain franchise notes, (4) that the $3,500,000 Citibank loan was in default, (5) that William was aware that Express could be liable for certain liabilities of other Fugazy companies, and (6) that

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William had represented to others that Metromedia would arrange for the cancellation of prior loan guarantees. Appellants conceded that these facts were not disclosed in their "Representations and Warranties of Express and the Stockholders" in the Agreement.

Appellants also admitted that in mid-March 1985, William sent a letter to a Fugazy Continental Corp. creditor in whose favor Express had confessed judgment, urging him to be patient because the Metromedia purchase was within a week of consummation. In the letter, which was introduced in evidence at trial, William asked the creditor not to "upset the apple cart" and stated: "As I explained to you, the auditors played games with . . . Express in order to make Express's statement look better."

William and Roy admitted in the Pretrial Order that at the time William transferred the Express License to Roy, both had actual knowledge that Express was in bankruptcy. They admitted that the transfer was not authorized by the bankruptcy court.

At trial, in support of its securities fraud and RICO claims, Metromedia presented evidence that, *inter alia*, in January 1985, it had received by mail from Express financial statements for Express and one of its subsidiaries. Subotnick testified that these financial statements contained material misrepresentations on which Metromedia relied in deciding to purchase Express. In particular, a "Consolidating Income Statement for the 9 Months Ended Nov [*sic*] 30, 1984" showed Fugazy Express with a nine-month net loss of $2,683,256. While Metromedia's analysts speculated that the loss might perhaps be as high as $4,700,000, they did not anticipate that Express's eventual audited financials would in fact reveal a net loss of $9,912,802 for the fiscal year. Similarly, though appellants gave Metromedia an unaudited consolidated balance sheet as of November 30, 1984, which

showed Express as having a net worth of $2,869,890, the audited balance sheet as of February 28, 1985, received by Metromedia months after the purchase was consummated, revealed a net worth of *minus* $5,530,468.

Prior to the purchase, Subotnick wondered whether Express might have liabilities or obligations that had not been disclosed. He testified that William assured him in a face-to-face conversation that "there were no oral obligations. There was nothing that we didn't know about. In fact, he sent me a memo I think the very next day, 10 pages long, that he is disclosing everything; we know about everything; there isn't anything that he hasn't told us about this company." In addition, Subotnick testified that William, whose office was in New York, telephoned him in New Jersey on at least a half-dozen occasions to press for the acquisition. Subotnick's telephone logs, reflecting several conversations with William, were also introduced. Subotnick testified that when Metromedia entered into the Agreement it was unaware of the extent of Express's losses or of its negative net worth of more than $5.5 million. He stated that if he had known the truth as to Express's financial status, Metromedia would not have entered into the Agreement.

With respect to documents that defendants contended that Kluge had signed, agreeing to indemnify them, Metromedia introduced expert testimony that the documents had not in fact been signed, and that the alleged Kluge signatures had likely been added by means of xerography. Defendants eventually conceded at trial that most of the documents were "not authentic."

C. The Trial Court's Rulings and the Jury Verdict

After the close of the evidence, following motions by both

sides for directed verdicts on various claims, the court determined a number of issues as a matter of law. Finding that there was no dispute that there were express warranties in the Agreement and that those warranties had been breached, and reading New York law as not requiring any other proof of reliance in such circumstances, the court granted Metromedia's motion for a directed verdict as to appellants' liability on the breach-of-warranty claim.

In addition, the district court ruled that the Bankruptcy Court Decision collaterally estopped William from denying that he had engaged in bankruptcy fraud in violation of 18 U.S.C. § 152. That section makes it unlawful for any person "either individually or as an agent or officer of any person or corporation, . . . with intent to defeat the provisions of title 11, [to] knowingly and fraudulently transfer[] . . . the property of such other person or corporation." The bankruptcy court had found that William's conduct constituted a "clear violation" of § 549(a)(2)(B) of the bankruptcy code, 11 U.S.C. § 549(a)(2)(B) (1988), Bankruptcy Court Decision at 22, and that it was "serious misconduct" by William "in a less than arms-length transaction" in "connivance" with Roy, *id.* at 25-26. Accordingly, the district court decided that it would instruct the jury that, in considering Metromedia's RICO claim, the jury must find that William had engaged in bankruptcy fraud, but that whether or not that fraud constituted part of the alleged pattern of racketeering activity would remain a question for the jury to decide.

As for the counterclaims asserted by defendants, all but one asserted by William were withdrawn after the close of the evidence, and the court dismissed the one that remained. The court also dismissed one of defendants' two third-party claims against Kluge.

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The court submitted the rest of the case to the jury in the form of special interrogatories. To the extent pertinent here, the jury found that Metromedia had proven its claims against William under § 12(2) of the 1933 Act and under RICO. As for the predicate acts for the RICO claim, in addition to finding pursuant to the trial court's instruction that William had committed bankruptcy fraud, the jury found that William had committed mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, and securities fraud in violation of § 12(2). The jury found that Metromedia had suffered damages in the amount of $15,553,930.89. It denied punitive damages. As to defendants' surviving cross-claim against Kluge for indemnification, the jury found that defendants had not shown that Kluge entered into the claimed agreement.

Thereafter, defendants moved for judgment n.o.v. or, alternatively, a new trial. In support of the former, they argued, to the extent relevant here, (1) that Metromedia's § 12(2) claim should have been dismissed because that section was inapplicable and because the evidence did not support the verdict (2) that that claim could not constitute a RICO predicate unless the violation were willful, and the jury was not instructed as to the need to find willfulness; (3) that the allegations of securities fraud, mail fraud, and wire fraud as RICO predicates should have been dismissed for lack of causation because there was no evidence of reliance by Metromedia itself; and (4) that the allegation of bankruptcy fraud should have been dismissed because Express's License was not an asset of the bankruptcy estate when William transferred it to Roy. In support of their motion for a new trial, appellants argued, *inter alia*, that the question of whether the warranties that were breached had been "bargained for" should have been submitted to the jury; that the court's instructions to the jury with respect to the RICO claims were erroneous; and that Metromedia had waived any right

to assert collateral estoppel with respect to its allegation of bankruptcy fraud, because collateral estoppel had not been pleaded.

In an Opinion dated December 5, 1990, and published at 753 F. Supp. 93, the district court denied both motions. Reviewing the trial evidence in the light most favorable to Metromedia as the nonmoving party on the motion for judgment n.o.v., the court rejected all of defendants' challenges to the sufficiency of the evidence. It also rejected most of the legal premises of their motions for dismissal and their challenges to the instructions. Reviewing the evidence under a more relaxed standard on the new trial motion, the court stated that it would not order a new trial unless it were persuaded that prejudicial error had crept into the record or that a substantial injustice had been done, and it concluded that it was not so persuaded. The court noted that though appellants were perhaps correct in their contention that willfulness was a prerequisite for use of a § 12(2) claim as a RICO predicate, it would not grant a new trial on this basis since appellants had failed to raise this issue before the jury began its deliberations.

Following the denial of these motions, the court entered an amended judgment ("judgment") in favor of Metromedia (1) against William, Travelco, and International, jointly and severally, in the amount of $15,553,930.89 for breach of warranty, and (2) against William alone in the amount of $46,661,792.67 on the RICO claim, representing treble the amount of damages found by the jury, and including $15,553,930.89 on the claim under § 12(2). The judgment provided that "Metromedia shall not recover more than a total of $46,661,792.67." It dismissed all of Metromedia's other claims and dismissed all counterclaims and third-party claims.

This appeal followed, with appellants challenging so much of

the judgment as awarded Metromedia damages on its claims for breach of warranty, securities fraud, and racketeering. Appellants have not addressed so much of the judgment as dismissed their counterclaims or third-party claims, and those dismissals are affirmed without discussion.

II. DISCUSSION

On appeal, William, International, and Travelco contend that the district court erred in directing a verdict as to liability on the breach-of-warranty claim. William also contends that the court (1) should have granted his motion for judgment n.o.v. dismissing the § 12(2) claim; (2) erred in ruling that he was collaterally estopped from contending that he had not committed bankruptcy fraud, instead of ruling that Metromedia was collaterally estopped from contending that he had committed such fraud; and (3) erred in its instructions to the jury as to RICO's pattern requirement and the elements of the various RICO predicate acts. For the reasons below, we find no basis for reversal.

A. The Breach-of-Warranty Claim

In the Pretrial Order, appellants admitted (a) that in the "Representations and Warranties of Express and the Stockholders" section of the Agreement, they had warranted that Express had no pending or threatened litigation or outstanding contracts that were not there disclosed; and (b) that in fact there were six such litigations, four confessions of judgment, and a number of contractual obligations that were not there disclosed. Nonetheless, they contend that the district court erred in directing a verdict against them as to liability on Metromedia's breach-of-warranty claim, on the premise that there was a triable issue of fact as to whether the express warranties given by them in the Agreement were "bargained for." We reject their contention.

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The trial court may direct a verdict where the evidence, viewed in the light most favorable to the nonmoving party, " 'is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.' " *Sir Speedy, Inc. v. L. & P Graphics, Inc.*, 957 F.2d 1033, 1038-39 (2d Cir. 1992) (quoting *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970)). The framework that governs the district court's decision on a motion for a directed verdict also applies to our review of that decision. *See, e.g., Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d at 1039; *Powell v. Gardner*, 891 F.2d 1039, 1043 (2d Cir. 1989); *Konik v. Champlain Valley Physicians Hospital Medical Center*, 733 F.2d 1007, 1013 (2d Cir.), *cert. denied*, 469 U.S. 884 (1984). If, drawing all reasonable inferences in favor of the party that opposed the directed verdict and making all credibility assessments in its favor, there was not sufficient evidence to permit a rational juror to find in its favor, we will uphold the directed verdict.

The substantive framework for Metromedia's breach-of-warranty claim is provided by New York law. In the leading case, *CBS Inc. v. Ziff-Davis Publishing Co.*, 75 N.Y.2d 496, 554 N.Y.S.2d 449 (1990), the New York Court of Appeals noted that a breach-of-warranty claim is grounded in contract, and it stated that a buyer need not show that he "believed that the assurances of fact made in the warranty would be fulfilled. The right to indemnification depends only on establishing that the warranty was breached . . . ." *Id.* at 503-04, 554 N.Y.S.2d at 453. The court noted that it was not suggesting that there need be no reliance rather, it stated that "the required reliance is established if as here, the express warranties are bargained-for terms of the seller." *Id.* at 506 n.5, 554 N.Y.S.2d at 454 n.5. The court stated that an "express warranty is as much a part of the contract as any other term." *Id.* at 503, 554 N.Y.S.2d at 453.

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Since as a matter of law, an express warranty is as much a part of the contract as any other term, the inclusion in the Agreement here of the "Representations and Warranties of Express and the Stockholders" established that those representations and warranties were part of the bargain reached between Metromedia and appellants. No rational juror could have found that it was not part of the bargain. Indeed, it is noteworthy that appellants in their proposed jury instructions did not ask to have the jury decide such a question. Rather, they asked the court to inform the jury that Metromedia could prevail on its breach-of-warranty claim if it proved (1) the existence of an express warranty, (2) material breach of the warranty, (3) damages proximately resulting from the material breach, and (4) justifiable reliance on the warranty. Neither in their initial submission of this request nor in a slightly amended version thereafter did appellants make any mention whatever of a supposed question as to whether the warranties were "bargained for."

The first two questions appellants sought to have the jury consider had been answered by appellants' admissions in the Pretrial Order; the fourth was a matter of law under the ruling in *CBS Inc. v. Ziff-Davis Publishing Co.* Only the matter of damages was left to be decided, and that question was given to the jury. As the district court noted, appellants advanced no defense to the breach-of-warranty claim, making no showing that they agreed to the warranties as a result of, for example, fraud, mistake, or duress. Accordingly, there was no issue for the jury to decide with respect to appellants' liability on the breach-of-warranty claim, and the district court properly ruled that Metromedia was entitled to recover its damages on that claim as a matter of law.

B. The Section 12(2) Claim

With respect to Metromedia's claim for damages under

§ 12(2) of the 1933 Act, William contends (a) that the district court should have summarily dismissed this claim on the ground that that section applies only to public offerings, not to a private sale such as this, or (b) that in any event, the court should have granted judgment n.o.v. dismissing it on the ground that there was insufficient evidence that any prospectus or oral communication was instrumental in effecting the sale of the Express stock to Metromedia. These contentions have no merit.

To the extent pertinent here, § 12(2) imposes civil liability on any person who

> offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission).

15 U.S.C. § 771(2). In support of their contention that this section does not apply to private sales, William cites only to general statements about the 1933 Act's legislative history and to various cases stating that the legislation was intended to protect the public. The section has, however, consistently been applied to private as well as public offerings of securities. *See, e.g., Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680, 695 (5th Cir. 1971) ("liability under Section 12(2) would not be affected by a finding that the offering was private"); *see Wilson v. Saintine*

Exploration & Drilling Corp., 872 F.2d 1124 (2d Cir. 1989) (applying § 12(2) to private sale); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359 (4th Cir. 1986) (same); *Nor-Tex Agencies, Inc. v. Jones*, 482 F.2d 1093, 1099 (5th Cir. 1973) (same), *cert. denied*, 415 U.S. 977 (1974); *see also* L. Loss, *Fundamentals of Securities Regulation* 1021-22 (1983).

With respect to William's contention that he was entitled to judgment n.o.v. on the ground that the evidence was insufficient to establish an offer or sale "by means of" a prospectus or oral communication, our standard of review is identical to that with respect to review of the decision on a motion for directed verdict. *See, e.g., Sir Speedy, Inc. v. L & P Graphics, Inc.* 957 F.2d at 1038-39; 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524, at 541-42 (1971) ("9 *Wright & Miller*"). Again we view the evidence in the light most favorable to the party against which the motion was made, *see e.g., Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 889 (2d Cir. 1988); *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167 (2d Cir. 1980); *Simblest v. Maynard*, 427 F.2d at 4, and we may reverse the denial of judgment n.o.v. only if we can conclude that; even making all credibility assessments and drawing all inferences against the moving party, a reasonable juror would have been compelled to accept the view of the moving party,

In order to prevail on a claim under § 12(2) for a sale based on an oral communication, a purchaser of securities must show that the communication was "intended or perceived as instrumental in effecting the sale." *Jackson v. Oppenheim*, 533 F.2d 826, 830 n.8 (2d Cir. 1976). Reliance by the buyer need not be shown, for § 12(2) "is a broad anti-fraud measure and imposes liability whether or not the purchaser actually relied on the misstatement." *Akerman v. Oryx Communications, Inc.*, 810 F.2d 336, 344 (2d Cir.

1987). The section requires only "some" causal connection between the alleged communication and the sale, "even if not 'decisive.' " *Jackson v. Oppenheim*, 533 F.2d at 830 n.8.

The oral statement itself need not be considered in isolation rather than in the context of the local presentation. A seemingly innocuous oral communication not containing affirmative misrepresentations may violate § 12(2) if it is used to emphasize, or induce reliance on, some other representation that is false or misleading. *See, e.g., Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989). Further § 12(2) reaches false or misleading oral statements communicated interstate, if in some other respect the mails or instruments of interstate transportation or communication have been used in the sale of the securities. *See, e.g., Schillner v. H. Vaughan Clarke & Co.*, 134 F.2d 875, 877 (2d Cir. 1943); *Creswell-Keith, Inc. v. Willingham*, 264 F.2d 76, 81 (8th Cir. 1959) ("a sale of securities induced by oral face to face fraudulent representations, which is completed by means of payment of the purchase price by mail, is protected by section 12(2)"); L. Loss, *Fundamentals of Securities Regulation* 1027-28 (1983).

Here, the evidence was sufficient to permit a rational juror to infer that false and misleading oral communications by William were instrumental in causing Metromedia to purchase the Express stock. Appellants delivered financial statements to Metromedia falsely showing, for example, that Express had a net worth of some $2.9 million when in fact its net worth was minus $5.5 million, and William assured Subotnick in a face-to-face conversation that "[t]here was nothing that [Metromedia] didn't know about." Subotnick testified that William also repeatedly telephoned him and attempted to convince him to consummate the acquisition, describing various Express prospects that William said would improve its business; that prior to the acquisition Metromedia did

not know Express's true financial condition; and that had it known, it would not have proceeded with the acquisition. With Subotnick's testimony fully credited and all reasonable factual inferences drawn in favor of Metromedia, the record permitted the jury to find that in orally touting Express's prospects to Subotnick in an effort to persuade Metromedia to purchase Express, William did not disclose the fact that, or the degree to which, Express's financial condition had been misrepresented, and he orally assured Subotnick that nothing had been concealed. The jury was therefore entitled to conclude that certain of William's oral assurances were false statements, that other statements were misleading at least by omission, and that either or both contributed to Metromedia's decision to purchase. The district court thus correctly denied the motion for judgment n.o.v. with respect to this claim.

C. The Civil RICO Claim

William makes a number of challenges with respect to Metromedia's claim under Rico. He contends principally that no predicate acts were properly established because (a) the jury was not instructed that it must find that a § 12(2) violation was willful in order to constitute a RICO predicate, (b) Metromedia, not William, should have been held collaterally estopped from litigating the question of whether he had committed bankruptcy fraud, and (c) the jury was not properly instructed with respect to reliance as an element of mail and wire fraud as RICO predicate acts. He also contends that the court erred in its instructions with respect to RICO's pattern requirement.

1. The Section 12(2) Violation as a RICO Predicate Act

In addition to his challenges to Metromedia's claim directly under § 12(2), discussed in Part II.B. above, William contends that

in order to use a violation of § 12(2) as a predicate for a RICO claim, a plaintiff must prove that the violation was willful. He argues that the district court erred in failing to instruct the jury as to the need to find willfulness in considering the RICO claim. Accepting William's legal premise as valid, *see Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488 (1985) (" 'a racketeering activity . . . must be an act in itself *subject to* criminal sanction' (emphasis added)" (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)); *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1325 (1992) (O'Connor, J., concurring) (RICO "unmistakably requires" that securities fraud, in order to serve as a predicate act, must have been "sufficiently willful to constitute a criminal violation"); *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 29 & n.4 (2d Cir. 1983); § 24 of the 1933 Act, 15 U.S.C. § 77x (1988) (imposing criminal liability under § 12(2) only for violations that are "willful"), we nonetheless conclude that in light of the procedural posture of the case and the evidence in the record, there is no basis for reversal.

Several sets of procedural principles are pertinent. First, Fed. R. Civ. P. 50(b) generally prohibits judgment n.o.v. on any ground not raised in a motion for a directed verdict. *See Abeshouse v. Ultragraphics, Inc.*, 754 F.2d 467, 473 (2d Cir. 1985); 5A *Moore's Federal Practice* ¶ 50.08, at 50-83 to 50-86 (2d ed. 1992); 9 *Wright & Miller*, § 2537, at 598. Relief from this requirement is available only to prevent a "manifest injustice." *Sojak v. Hudson Waterways Corp.*, 590 F.2d 53, 54-55 (2d Cir. 1978) (per curiam). If the evidence was insufficient but no motion for directed verdict was made, the court could grant a new trial if it were satisfied that justice so required. *See, e.g., Russo v. State of New York*, 672 F.2d 1014, 1021-22 (2d Cir. 1982); *Sojak v. Hudson Waterways Corp.*, 590 F.2d at 54-55; *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 816-17 (2d Cir. 1970).

Second, the civil procedure rules also provide that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. The purpose of this Rule is to require the parties to give the trial court an adequate opportunity to cure any error in the instructions before the jury deliberates. *See, e.g.*, 9 *Wright & Miller* § 2551, at 623. Absent objection, an error may be pursued on appeal only if it is "plain error" that may result in a miscarriage of justice, or in "obvious instances of . . . misapplied law." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981); *see, e.g., Air et Chaleur, S.A. v. Janeway*, 757 F.2d 489, 494 (2d Cir. 1985).

Further, under Fed. R. Civ. P. 49(a), a party who failed to object, before the jury retired, to the substance of special verdict questions to be put to the jury has no right to object to such matters on appeal. *See, e.g., Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 710 n.8 (2d Cir. 1983). A party who only belatedly noticed the failure to submit a needed question to the jury could ask the court to submit that question in a postverdict interrogatory, and the trial judge would have discretion to submit such an interrogatory. *See, e.g., Croce v. Kurnit*, 737 F.2d 229, 233-34 (2d Cir. 1984).

Finally, a motion for a new trial on the ground that the verdict was against the weight of the evidence is committed to the sound discretion of the trial judge. *See, e.g., Brady v. Chemical Construction Corp.*, 740 F.2d 195, 200 (2d Cir. 1984); *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978). Assuming that the district court's denial of such a motion is reviewable, *but see Dunlap-McCuller v. Riese Organization*, Nos. 92-7676, etc., slip op. 189, 197 (2d Cir. Nov. 25, 1992) ("district court order granting or denying a motion for a new trial on the grounds that a verdict is

against the weight of the evidence is not reviewable in this Circuit"); *Kirschner v. Office of the Comptroller*, 973 F.2d 88, 96 (2d Cir. 1992) (same); *Roberts v. Consolidated Rail Corp.*, 893 F.2d 21, 26 (2d Cir. 1989) (same), such a denial will not be reversed unless the denial constituted an abuse of discretion, *Brady v. Chemical Construction Corp.*, 740 F.2d at 201-02; *Bevevino v. Saydjari*, 574 F.2d at 684. *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2819, at 120 (1973) (noting trend away from view that such decisions are not reviewable at all). Where the resolution of the issues depended on assessment of the credibility of the witnesses, it is proper for the court to refrain from setting aside the verdict and granting a new trial. *See, e.g., Tennant v. Peoria & P. Union Ry.*, 321 U.S. 29, 35 (1944) (jury's credibility assessments are entitled to deference); *Wade v. Orange County Sheriff's Office*, 844 F.2d 951, 955 (2d Cir. 1988).

On the present appeal, it is not entirely clear whether William's willfulness argument is based solely on the district court's failure to instruct, which would be a basis for a new trial, or whether he also contends that there was no evidence of willfulness, a potential basis for judgment n.o.v. In the district court, the question was raised in the judgment n.o.v. section of defendants' post-trial motion, not in the section in which appellants alternatively requested a new trial. To the extent that appellants seek to assert that there was no evidence of willfulness and that they were entitled to judgment n.o.v., that argument is procedurally barred. Though at the close of the evidence defendants moved for a directed verdict on a number of grounds, this ground was not among them. Thus, judgment n.o.v. would have been improper, and they are not entitled to entry of judgment in their favor on this appeal.

To the extent that the willfulness argument challenged the trial court's instructions or suggested that the verdict was against the

weight of the evidence as to willfulness, the argument was more properly one for a new trial, and the trial judge so treated it. Though noting that the contention that willfulness is an element for RICO purposes "may be correct," the court denied a new trial on the ground that appellants had not raised the question before the jury retired to begin its deliberations. The finding of default is clearly supported by the record. Defendants made no request for an instruction that § 12(2) could not serve as a RICO predicate act unless the violation was willful. Their requests to charge included a lengthy proposed instruction with respect to Metromedia's claim directly under that section; that request, properly, did not mention any need for a finding of willfulness. Though defendants also made a number of requests for instructions with respect to the other alleged RICO predicate acts, they made no mention of § 12(2) as a RICO predicate or of any additional questions to be considered by the jury in that connection. Further, defendants did not object to the trial court's instructions with respect to use of the § 12(2) claim as a RICO predicate; and they did not object to the special verdict form, which expressly instructed the jury that if it found in favor of Metromedia on the § 12(2) claim it was required to find that Metromedia had proven securities fraud as a RICO predicate act. Nor did they request that a postverdict interrogatory be submitted to the jury on the question of willfulness.

In this appeal, William argues that the trial court should have excused appellants' failure to raise the issue timely in order to avoid "obvious injustice." Given our interpretation of the term "willful" and given the evidence of record, we are not persuaded that a new trial was needed to avoid injustice.

Although we have not directly addressed the meaning of the term "willful" in § 24 of the 1933 Act as it would apply to a § 12(2) violation, we have stated that the government could prove that a

violation of § 17(a) of the 1933 Act, 15 U.S.C. § 77q(a) (1988), was willful within the meaning of § 24 "by proving that a defendant deliberately closed his eyes to facts he had a duty to see." *United States v. Benjamin*, 328 F.2d 854, 862 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964). In addition, we have more fully explored the meaning of "willful" in connection with prosecutions under § 32(a) of the 1934 Act, 15 U.S.C. § 78ff (1988), the first clause of which is similar to § 24 of the 1933 Act. *Compare* § 24 of the 1933 Act, 15 U.S.C. § 77x (imposing criminal liability on "any person who willfully violates any of the provisions of this subchapter [1933 Act]" *with* § 32(a) of the 1934 Act, 15 U.S.C. § 78ff (imposing criminal liability on "[a]ny person who willfully violates any provisions of this chapter [1934 Act]"). In *United States v. Peltz*, 433 F.2d 48 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971), we held that a prosecution under the quoted clause of § 32(a) required a showing "that the act [was] wrongful under the securities laws and that the knowingly wrongful act involve[d] a significant risk of effecting the violation that has occurred," *id.* at 55; *see also United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976). Given the similarity of the language of the two statutory provisions, we believe the *Peltz* test too should be applied in determining whether a violation of § 12(2) was willful. Thus, we conclude that, with respect to oral communications in violation of § 12(2), willfulness may be established by a showing (1) that the defendant either (a) knowingly made false or materially incomplete misleading statements or (b) made false or materially incomplete statements with respect to facts to which he had deliberately closed his eyes but which he had a duty to see, and (2) that he knew that his statements significantly increased the possibility of a sale of the securities in question.

We conclude that had the jury been so instructed in the present case, it could easily have found that William's violation of § 12(2) was willful. As discussed in Part II.B. above, William made oral

statements falsely assuring Subotnick that all material facts had been disclosed to Metromedia, and he made other oral statements that were materially misleading because of their implicit adoption of, and failure to disclose the falseness of, the financial documents' representatitons as to Express' condition. As to willfulness, there was a sufficiently great disparity between the Express financial statements given to Metromedia prior to the acquisition (assets of some $11.65 million and liabilities of some $8.77 million) and the post acquisition revelation of its true financial condition (assets of approximately $8.59 million and liabilities exceeding $14 million) to permit the jury to infer that the preacquisition financials were false and that their inaccuracy was not attributable merely to negligence. The jury could also infer that William, given his 100% ownership of, and top executive positions in International, Travelco, and Express, was aware that Express did not have a net worth of some $3 million, as represented, but instead had a deficit of some $5.5 million. It had been conceded prior to trial that the Fugazy companies' were in dire financial straits, and the evidence depicted a William who was desperate for Metromedia to purchase Express. And, if in doubt as to whether the above factors circumstantially bespoke willfulness, the jury could infer from William's own words that his misrepresentations and nondisclosures were intentional and designed to deceive, as in mid-March he wrote that his auditors had "played games with . . . Express in order to make Express' statement look better."

In sum, the question of willfulness was indeed one for the jury, but the evidence was such that, had the jury been instructed that it must answer that question, a finding of willfulness could not have been set aside for lack of evidence. In all the circumstances, it was within the discretion of the trial court to decline to excuse appellants' failure to ask for an instruction on willfulness and to deny their motion for a new trial.

2. Bankruptcy Fraud

In challenging the district court's ruling that the Bankruptcy Court Decision collaterally estopped him from contending that he had not committed bankruptcy fraud, William contends that as a matter of law his transfer of the Express License to Roy could not constitute bankruptcy fraud because, he claims, the FCC in an October 26, 1988 letter ("FCC Letter") ruled that at the time of that transfer the License was not property of the bankruptcy estate. He also argues that Metromedia waived the right to assert collateral estoppel by failing either to plead it originally or to ask for leave to file a supplemental pleading asserting it, and that he was unduly prejudiced by Metromedia's presentation of evidence as to an issue on which there was to be an estoppel. We reject all of his contentions.

The doctrine of collateral estoppel, or issue preclusion, bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding, if that party had a full and fair opportunity to litigate the issue in the prior proceeding and the decision of the issue was necessary to support a valid and final judgment on the merits. *See, e.g., Gelb v. Royal Globe Insurance Co.*, 798 F.2d 38, 44 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987); *Zdanok v. Glidden Co., Durkee Famous Foods Division*, 327 F.2d 944, 955 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); *see generally Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4416, at 136-48 (1981) ("18 *Wright & Miller*"); *Restatement (Second) of Judgments* § 27 (1982). Certain of these conditions warrant elaboration for purposes of the present appeal.

First, the issue as to which preclusion is sought must be identical to the issue decided in the prior proceeding. Issues of fact

may bear the same label without being identical. They are not identical if the legal standards governing their resolution are significantly different. *See, e.g., Jim Bean Brands Co. v. Beamish & Crawford Ltd.*, 937 F.2d 729, 734 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1169 (1992); *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987).

Further, even if the issues in the two proceedings are identical, a decision by an administrative agency cannot be the basis for collateral estoppel unless it was an adjudicative decision. An agency action granting or denying a privilege is not an adjudicative decision unless the agency has made its decision using procedures substantially similar to those employed by the courts. *See generally Delamater v. Schweiker*, 721 F.2d 50, 53 (2d Cir. 1983) (per curiam); *Associated Industries of New York State, Inc. v. United States Department of Labor*, 487 F.2d 342, 350 n.10 (2d Cir. 1973); 4 Davis, *Administrative Law Treatise*, § 21:3 (2d ed. 1983); *Restatement (Second) of Judgments* § 83, comment b (1982).

As to the need for finality of decision, collateral estoppel, unlike appealability under 28 U.S.C. § 1291 (1988), "does not require a judgment 'which ends the litigation . . . and leaves nothing for the court to do but execute the judgment.'" *Zdanok v. Glidden Company, Durkee Famous Foods Division*, 327 F.2d at 955 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Rather the concept of finality for collateral estopel purposes "includes many dispositions which, though not final in that sense, have nevertheless been fully litigated." *Zdanok v. Glidden Company, Durkee Famous Foods Division*, 327 F.2d at 955. Whether a judgment that is not final within the meaning of § 1291 "ought nevertheless be considered 'final' in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for

review." *Lumus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962). The mere fact that the damages awarded to the plaintiff have not been yet calculated, though normally precluding an immediate appeal, *see* our companion opinion filed today in *In re Fugazy Express, Inc.*, Nos. 92-5005, -5007 (2d Cir. Dec. 17, 1992), does not prevent use of a final ruling on liability as collateral estoppel. *Zdanok v. Glidden Company, Durkee Famous Foods Division*, 327 F.2d at 955; 18 *Wright & Miller* § 4434, at 321 ("Recent decisions have relaxed traditional views of the finality requirement by applying issue preclusion . . . to determinations of liability that have not yet been completed by an award of damages or other relief.").

When two lawsuits have resulted in inconsistent final decisions of the same issue, the general rule is that "it is the later, not the earlier, judgment that is accorded conclusive effect in a third action." *Restatement (Second) of Judgments* § 15 (1982). Although we question whether such a rule would be applicable to inconsistent decisions if the second "judgment" were an administrative agency decision and the first were a court decision, we have no doubt that where the court decision is later, it, and not the agency decision, is to be given preclusive effect.

These principles defeat William's claims, for the Bankruptcy Court Decision meets all of the requirements for collateral estoppel, and it is unclear that the FCC Letter meets any of them. There is no question that the issues in the present case as to (a) whether the License was property of Express' bankruptcy estate at the time of William's purported transfer and (b) whether William fraudulently transferred the License to Roy's company are among the very questions that were litigated in, and necessary to the decision of, the bankruptcy court. It is also indisputable that William had a full and fair opportunity to litigate these issues in the bankruptcy court. He appeared in that proceeding, conceded that in

making the transfer he had acted without authority, and consented to an order entered in September 1987 declaring the assignment null and void and directing the Trustee to convey the License to Metromedia. In its 1990 decision, the bankruptcy court found that the License was bankruptcy estate property and that William had transferred it without permission of or notice to the bankruptcy court, in "connivance" with Roy. There was nothing tentative about the bankruptcy court's decision. *See, e.g.*, Bankruptcy Court Decision at 23 ("The undisputed liability of the transferor, William Fugazy, for the improper transfer of the License is . . . a settled matter of the law of this case."). And that decision has been reviewed—and affirmed—by the district court in accordance with procedures established in 28 U.S.C. § 158(a) (1988). The fact that the appeal of that matter from the district court to this Court is being dismissed for lack of appellate jurisdiction does not mean that the bankruptcy court's decision was not sufficiently final for purposes of collateral estoppel.

On the other hand, even if there were no bankruptcy court decision, the language of the FCC Letter itself suggests that it could not be the basis for collateral estoppel in favor of William. That letter, which does not appear to have been issued after court-type proceedings, stated in part as follows:

> . . . . Express, Inc., licensee of record, assigned the license for KXY-610 to R.D.F. Limousine who then became the licensee of record for our purposes. Information submitted to us, the Consent Order of the Bankruptcy Court in particular, casts doubt upon the validity of this transaction, and would under other circumstances require an administrative inquiry on our part. . . .

Appendix B

> Affidavits submitted with the pleadings establish that KXY-610 ceased operations in December, 1986. Under Section 90.157 of our Rules, 47 C.F.R. § 90.157, the license for KXY-610 has therefore cancelled and must be returned to the Commission.

The reference to the need, or lack thereof, for "administrative inquiry" suggests that the agency itself treated its ruling as an administrative decision. Moreover, it is hardly clear that a decision as to whether the License was bankruptcy estate property when William transferred it would have been necessary to a regulatory decision as to whether to approve the trustee's sale of the License to Metromedia. Nor is it likely that the regulatory principles shaping such a decision would have been the same as the bankruptcy principles governing what assets are to be considered property of a bankrupt's estate.

Further, the regulation cited in the FCC Letter provides that for purposes of return of licenses to the Commission, a broadcast station is considered to have been permanently discontinued if it "has not operated for 1 year or more." 47 C.F.R. § 90.157(c). The inference to be drawn from the FCC's invocation of this regulation and its view that Express ceased operations in December 1986 is not that Express had no property interest in the License in January 1987 but rather that its interest continued until at least December 1987.

Other statements in the 1988 FCC Letter support this inference. The Letter states that the License was in fact transferred and that Limousine thereby became the new licensee, implying that in January 1987 the License was indeed, in the FCC's view, a transferrable asset. That implication is also consistent with the facts that in April 1987 the FCC approved the transfer, and in

October 1987 it advised the trustee that he could not then sell the License to Metromedia without the consent of Limousine. In sum, after January 1987 the FCC itself treated as belonging to Limousine the very License that had belonged to Express until William transferred it. This treatment belies any supposed FCC ruling that in January 1987 the License was not property of the bankruptcy estate.

William's other challenges to the district court's collateral estoppel ruling do not require extended discussion. The waiver argument borders on the frivolous. The bankruptcy court decision was filed on the day the present case went to trial. Metromedia's counsel made reference to the decision in his opening statement to the jury and asserted during trial that the decision collaterally estopped defendants from contesting that there had been bankruptcy fraud. Appellants had as much notice of the claim of estoppel as could reasonably be required.

Nor is there merit in the contention that appellants were unduly prejudiced by Metromedia's presentation of evidence in connection with a matter as to which they were collaterally estopped. Though the question of whether William had committed bankruptcy fraud had been determined, Metromedia was nonetheless required to introduce some evidence with respect to that fraud in order to show that it was part of the alleged pattern of racketeering activity.

3. The Mail and Wire Fraud Predicate Acts

William argues that the jury's findings with respect to mail and wire fraud as RICO predicate acts should be reversed because (1) the district court failed to instruct the jury properly as to the required "causal nexus" between these predicate acts and

Metromedia's injury, and (2) the evidence adduced by Metromedia was insufficient to support a finding of justified reliance. We find no basis for reversal.

RICO provides that "[a]ny person injured in his business or property by reason of " a RICO violation may bring a civil action to recover treble damages. 18 U.S.C. § 1964(c). " 'The phrase "by reason of " requires that there be a causal connection between the prohibited conduct and [the] plaintiff's injury.' " *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990) (quoting *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 636 (2d Cir. 1989)); *see Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (section 1964(c) requires plaintiff to establish proximate cause). In the context of an alleged RICO predicate act of mail fraud, we have stated that to establish the required causal connection, the plaintiff was required to demonstrate that the defendant's misrepresentations were relied on. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d at 1311; *see also Brandenburg* v. *Seidel*, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988); *Grantham & Mann, Inc. v. American Safety Products, Inc.*, 831 F.2d 596, 606 (6th Cir. 1987).

In the present case, the trial court instructed the jury on causation without specifying the role of reliance. It stated as follows:

> If you find that all of the elements of the alleged violation of Section 1962(b), (c) or (d) . . . have been established by a preponderance of the evidence, before you may find for Metromedia, you must also find that Metromedia sustained an injury to its business. Either damages *caused* by the unlawful acts or damages *caused*

> by the pattern of acts, or both, will satisfy th[is] requirement. *Damages not caused by the unlawful acts or pattern of acts do not satisfy this requirement.*

(Trial Transcript 2252 (emphasis added)). Though it would have been preferable to have included an instruction that informed the jury of the relationship between causation and reliance, the absence of such an instruction here provides no basis for reversal. Subotnick testified that he received some of the false financial statements in the mail, that he had numerous telephone conversations with William urging Subotnick to have Metromedia make the purchase, and that if Subotnick had known the extent to which the financial figures provided by William and Express were inaccurate, Metromedia would not have entered into the stock purchase agreement. Thus, there was plainly sufficient evidence for the jury to find causation and reliance.

Finally, we reject William's contention that any reliance by Metromedia could not have been justified because it had a team of attorneys and financial experts studying Express's condition. Appellants' misrepresentations and nondisclosures denied Metromedia's advisors access to accurate information, and the record does not suggest that they knew the true state of Express's affairs. The suggestion that Metromedia could not justifiably rely on appellants' representations is meritless.

4. RICO's Pattern Requirement

William challenges the trial court's instruction as to what Metromedia was required to prove in order to establish a "pattern" of racketeering activity within the meaning of RICO. The court told the jury, *inter alia*, that Metromedia was required to show that

William's unlawful acts were neither isolated nor sporadic, that those acts were related to each other, and that they were continuing or constituted a threat of continuing racketeering activity. The court instructed that one way in which Metromedia could meet this burden was by showing that William's unlawful activity was "repeated over a substantial period of time—for example, a few weeks or months." William contends that this was error. While the contention appears to have merit, we conclude that the error was harmless.

Though there is no bright line test for determining precisely what period of time is "substantial" for purposes of finding the continuity necessary to establish a RICO pattern, the Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), stated that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." *Id.* at 242. Periods of 19 or 20 months, however, have been held sufficient to support a finding of continuity, *see United States v. Pelullo*, 964 F.2d 193, 210 (3d Cir. 1992) (19 months sufficient); *United States v. Stodola*, 953 F.2d 266, 270 (7th Cir. 1992), (closed-ended period of 20 months sufficient), *cert. denied*, 61 U.S.L.W. 3257 (U.S. Oct. 5, 1992), and "where continuity can be inferred from the jury's findings, an erroneous instruction may constitute harmless error." *United States v. Pelullo*, 964 F.2d at 209; *see United States v. Kotvas*, 941 F.2d 1141, 1144-45 (11th Cir. 1991).

In the present case, the district court's illustration that "a few weeks or months" might constitute a "substantial period of time" was erroneous. The RICO predicate acts found by the jury, however, were not so limited. In addition to the bankruptcy fraud found by the bankruptcy court, the jury found that William had committed three other types of predicate acts—mail fraud, wire

fraud and securities fraud. The record supports inferences that the securities and mail fraud began at least as early as January 1985, when appellants mailed to Subotnick financial statements for Express that significantly overstated its net worth and understated the losses incurred in its recent performance. The unlawful activity continued at least until January 1987, when William committed bankruptcy fraud by transferring one of Express's assets to his son. The jury was instructed that in order to find for Metromedia on the RICO claim it must find that the predicate acts were related, and it presumably so found. The related predicate acts that the jury found proven spanned approximately two years, and the instructions' reference to a few weeks or months was therefore harmless.

CONCLUSION

We have considered all of appellants' arguments on this appeal and have found in them no basis for reversal. The amended judgment of the district court is affirmed.

APPENDIX C — DECISION IN COMPANION CASES DOCKET NOS. 92-5005, -5007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1418, 1655 August Term, 1991

(Argued: April 24, 1992 Decided: DEC 17 1992)

Docket Nos. 92-5005, -5007

In re FUGAZY EXPRESS, INC.,

Debtor,

ZACHARY SHIMER, Chapter 7 Trustee of Fugazy Express, Inc., and METROMEDIA COMPANY,

Plaintiffs-Appellees,

-v.-

WILLIAM D. FUGAZY, FUGAZY LIMOUSINE LIMITED, formerly known as R.D.F. Limousine Corp., ROY D. FUGAZY,

Defendants-Appellants.

Before: OAKES*, KEARSE, and WALKER, *Circuit Juges.*

Appeal from an order of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge*, affirming an order of the United States Bankruptcy Court for the Southern District of New York, Burton R. Lifland, *Chief Judge*,

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* Judge Oakes was Chief Judge until July 1, 1992.

which held transfer of property from bankruptcy debtor's estate improper and awarded plaintiffs damages to be determined after an accounting.

Appeal dismissed for lack of appellate jurisdiction.

MARGARET GROARKE, New York, New York
(Zachary Shimer, Robert Najarian, Chadbourne & Parke, New York, New York on the brief), *for Plaintiff-Appellee Zachary Shimer.*

MARTIN I. SHELTON, New York, New York
(Mary Gail Gearns, Shea & Gould, New York, New York, on the brief), *for Plaintiff-Appellee Metromedia Company.*

ANDERSON KILL OLICK & OSHINSKY, P.C., New York, New York (Anthony Princi, Steven Cooper, Jordan W. Siev, New York, New York, of counsel) *for Defendant-Appellant William D. Fugazy, joined the brief filed by Defendants-Appellants Fugazy Limousine Limited and Roy D. Fugazy.*

JAMES LAWRENCE GARRITY, New York, New York
(George Kuntu-Blankson, Garrity & McCusker, New York, New York, on the brief), *for Defendants-Appellants Fugazy Limousine Limited and Roy D. Fugazy.*

ARNOLD I. BURNS, New York, New York
(Proskauer Rose Goetz & Mendelsohn, New York, New York, of counsel), *for Defendants-Appellants Fugazy Limousine Limited and Roy D. Fugazy.*

Appendix C

KEARSE, *Circuit Judge:*

Defendants William D. Fugazy ("William Fugazy" or "William"), Fugazy Limousine Limited ("Limousine"), and Roy D. Fugazy ("Roy Fugazy" or "Roy") (collectively the "Fugazy Parties") appeal from an order entered in the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge*, affirming an order of the United States Bankruptcy Court for the Southern District of New York, Burton R. Lifland, *Chief Judge*, which, *inter alia*, (1) ruled that William Fugazy had improperly transferred a broadcast license that was property of the estate of bankruptcy Chapter 7 debtor Fugazy Express, Inc. ("Debtor"), to Limousine and Roy Fugazy, and (2) ordered the payment of damages, to be determined after an accounting, and attorneys' fees to plaintiffs-appellees Zachary Shimer, who is the Chapter 7 trustee of the Debtor ("Trustee"), and Metromedia Company ("Metromedia"). Resolution of the damages and fees issues has been stayed by the bankruptcy court pending the outcome of this appeal. On appeal, the Fugazy Parties contend that these orders should be reversed on the ground that the license was not properly regarded as property of the Debtor's estate and that its transfer was properly approved by the pertinent regulatory authority. For the reasons below, we conclude that the order of the bankruptcy court was not a final order within the meaning of 28 U.S.C. § 158(a) (1988), that the order of the district court is therefore not sufficiently final to be appealable under 28 U.S.C. § 158(d) (1988) or 28 U.S.C. § 1291 (1988), and that the orders are not injunctive orders appealable under 28 U.S.C. § 1292(a)(1) (1988). Accordingly, we dismiss the appeal for lack of appellate jurisdiction.

Appendix C

I. BACKGROUND

Prior to July 1986, the Debtor was engaged in the business of selling and servicing franchises for livery and limousine services to independent limousine operators who conducted their operations using the "Fugazy" name. William Fugazy was chairman of the Debtor's board of directors. Roy, William's son, was formerly the Debtor's vice president for marketing and is the controlling shareholder of Limousine.

A. *The Events*

Pursuant to its franchise agreements, the Debtor provided radio dispatching services for its franchisees. The dispatches were broadcast over several radio frequencies, for which the Debtor had obtained six licenses and permits from the Federal Communications Commission ("FCC"). In July 1986, the Debtor filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code ("Code"), 11 U.S.C. § 101 *et seq.* (1988), *see id.*, §§ 1101-1174. In or about January 1987, William caused the Debtor to transfer its FCC license for the call sign KXY-610 and two specified frequencies ("KXY License" or "License") to Limousine without consideration. Limousine applied to the FCC for, and in April 1987 received, approval of the transfer. The bankruptcy court had neither been asked to approve, nor been informed of, the transfer; the FCC had not been informed of the Debtor's filing for bankruptcy.

In the meantime, in March 1987, the bankruptcy court entered an order converting the reorganization proceeding into one for liquidation under Chapter 7 of the Code, 11 U.S.C. §§ 701-766, and promptly appointed the Trustee to oversee the liquidation. In June 1987, a court-authorized auction was held, following which the

Trustee sold and transferred all right, title, and interest in the Debtor's six FCC licenses, including the KXY License, to Metromedia.

Metromedia soon discovered William's purported prior transfer of the KXY License to Limousine, and in August 1987, the Trustee and Metromedia commenced the present adversarial proceeding against the Fugazy Parties, seeking, *inter alia*, a declaration that the purported transfer was null and void because it had occurred without the permission of the bankruptcy court, and an accounting.

William conceded that in making the transfer he had acted without authority. On the basis of this concession, the bankruptcy court promptly entered an order in September 1987, which was consented to by William, the Trustee, and Metromedia ("Consent Order"), declaring the assignment null and void and directing the Trustee to convey the License to Metromedia. William and Metromedia were also directed to send a copy of the Consent Order to the FCC and to take whatever actions were requested by the FCC to effectuate the order's provisions. Counsel for Limousine and Roy Fugazy were present at all hearings relevant to the Consent Order. Immediately following entry of the order, Metromedia applied to the FCC to void the unauthorized assignment of the KXY License. Limousine opposed the application, and the FCC granted Limousine temporary authorization to use the License pending resolution of the dispute.

In a letter dated October 26, 1988, the FCC refused to act on Metromedia's request that the purported transfer to Limousine be voided, stating in pertinent part as follows:

> While the rights and obligations of the various parties *vis-a-vis* each other may be somewhat

> complex, their obligations to the Commission are quite simple. Fugazy Express, Inc., licensee of record, assigned the license for KXY-610 to R.D.F. Limousine, who then became the licensee of record for our purposes. Information submitted to us, the Consent Order of the Bankruptcy Court in particular, casts doubt upon the validity of this transaction, and would under other circumstances require an administrative inquiry on our part. Here, however, the particular facts before us make such action unnecessary.
>
> Affidavits submitted with the pleadings establish that KXY-610 ceased operations in December, 1986. Under Section 90.157 of our Rules, 47 C.F.R. § 90.157, the license for KXY-610 has therefore cancelled and must be returned to the Commission.

Though the FCC letter did not state specifically as of what date the KXY License had been cancelled, the cited regulation provided that for purposes of return of licenses to the Commission, a broadcast station is considered to have been permanently discontinued if it "has not operated for 1 year or more." 47 C.F.R. § 90.157(c). It is undisputed that Limousine used the frequencies covered by the KXY License at least from the time of the unauthorized assignment until December 1, 1988, when Limousine obtained a new license from the FCC to use those frequencies under a new call sign.

B. *The Decisions Below*

In early 1989, Limousine and Roy moved for summary

judgment dismissing the present action, asserting that the FCC had "cancelled" the License prior to January 1987 and arguing that thereafter the License was not property that could be deemed part of the bankruptcy estate, and hence the bankruptcy court had no jurisdiction over William's transfer to Roy. William joined the motion. The Trustee and Metromedia cross-moved for summary judgment and sought sanctions against all the Fugazy Parties. In a Memorandum Decision dated May 14, 1990 ("Memorandum Decision"), the bankruptcy court granted the motion of the Trustee and Metromedia and denied the motions of the Fugazy Parties. The bankruptcy court held (1) that the KXY License was property of the Debtor's estate within the meaning of § 541(a)(6) of the Code, 11 U.S.C. § 541(a)(6); (2) that the assignment of the Debtor's interest in the KXY License by William to Roy and Limousine constituted an improper postpetition transfer of estate property, in violation of § 549 of the Code, 11 U.S.C. § 549; (3) that the assignment of the Debtor's interest in the KXY License was "a less than arms-length transaction" by William in "connivance" with Roy, and constituted "serious misconduct" "in direct, willful contravention" of the automatic stay, in violation of § 362(a)(3) of the Code, 11 U.S.C. § 362(a)(3); (4) that the cancellation of the KXY License by the FCC had no effect on this proceeding; and (5) that pursuant to § 549, 550, and 362(h) of the Code, 11 U.S.C. §§ 549, 550, and 362(h), the Trustee and Metromedia were entitled to recover damages, costs, and attorneys' fees from Limousine and Roy, and the Trustee was entitled to recover attorneys' fees from William.

In accordance with its rulings, the bankruptcy court entered an order dated June 20, 1990 ("1990 Bankruptcy Court Order" or "Order") directing, *inter alia*, that there be an accounting with respect to the revenues received by Limousine with respect to its use of the KXY License:

Appendix C

ORDERED that Limousine shall, within fifteen (15) of [*sic*] service of Notice of Entry of this Order, file with the Court and serve the Trustee and counsel for Metromedia, with an accounting setting forth the revenues received by Limousine, its predecessors and successors, attributable to use of the License, which accounting shall specify the revenues received by Limousine and its predecessors and successors for the period of January 28, 1987 through June 18, 1987, and for the period of June 19, 1987 through the date of entry of this Order; and it is further

ORDERED that Metromedia and the Trustee each shall within fifteen (15) days of service of Notice of Entry of this Order file with the Court and serve counsel for Limousine, Roy Fugazy and William Fugazy with a statement of attorney's fees and expenses incurred in connection with the claims asserted in the written adversary proceeding; and it is further

ORDERED that objections, if any, to the accounting to be filed and served by Limousine and the statements of attorneys fees and expenses to be filed and served by the Trustee and Metromedia shall (i) be filed with the Court and served upon all counsel within thirty (30) days of receipt of such information, and (ii) shall be scheduled for hearing by the parties as soon as practicable; and it is further

> ORDERED that within fifteen (15) days after the later of (i) receipt of the respective submissions by Limousine, Metromedia and the Trustee, or (ii) resolution of any objections to the respective submissions by Limousine, Metromedia and the Trustee, the parties shall submit proposed orders and judgments consistent with the terms of the Memorandum Decision and this Order.

1990 Bankruptcy Court Order at 4-6. Though the parties have made submissions to the bankruptcy court in accordance with the Order, their time within which to file objections to the submissions has been stayed at the request of the Fugazy Parties.

The Fugazy Parties appealed the 1990 Bankruptcy Court Order to the district court pursuant to 28 U.S.C. § 158(a). They principally challenged the bankruptcy court's findings that the KXY License was property of the Debtor's estate and that the cancellation of the KXY License by the FCC was of no effect in this proceeding. In a Memorandum and Order dated February 25, 1991, the district court rejected these arguments and affirmed the Order in all respects. This appeal followed.

Metromedia moved before a motions panel of this Court to dismiss the appeal for lack of appellate jurisdiction. That motion was denied without prejudice to renewal before the panel to hear the appeal.

II. DISCUSSION

On this appeal, the Fugazy Parties pursue the arguments they made to the district court. Metromedia, in addition to defending the decision below on the merits, renews its contention that there is no

final order in this case and that this Court therefore lacks appellate jurisdiction.

When the district court has ruled on a bankruptcy matter as an appellate court pursuant to § 158(a), the court of appeals has jurisdiction to review the district court's decision if the case meets the requirements of either 28 U.S.C. § 158(d) or 28 U.S.C. § 1292. *See Connecticut National Bank v. Germain*, 112 S. Ct. 1146 (1992). The Fugazy Parties contend that their appeal meets both standards because the 1990 Bankruptcy Court Order is a final order within the meaning of § 158, and because the Order is an interlocutory refusal to modify an injunction within the meaning of § 1292(a) as, in effect, a refusal to lift the automatic bankruptcy stay imposed by 11 U.S.C. § 362. We have considered all of the Fugazy Parties' arguments in support of appellate jurisdiction and, for the reasons below, we conclude that neither of these provisions is applicable and that we lack jurisdiction to decide the present appeal.

A. *The Finality Contention*

1. *Section 158(d)*

Section 158(d) provides in pertinent part that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" entered by the district courts under § 158(a). 28 U.S.C. § 158(d). By its , terms, therefore, § 158(d) confers appellate jurisdiction only over a district court order that is "final." *See In re Hooker Investments. Inc.*, 937 F.2d 833, 836 (2d Cir. 1991); *In re Lomas Financial Corp.*, 932 F.2d 147, 150 (2d Cir. 1991). The district court itself, in contrast, has jurisdiction to hear bankruptcy appeals not only from orders that are final but also from orders that are nonfinal, so long as an appeal from the latter is taken "with leave of" the district court. 28 U.S.C.

§ 158(a). The district court's own decision of an appeal from the bankruptcy court is not a final decision for purposes of appeal to the court of appeals unless the order of the bankruptcy court was final. *See, e.g., In re Hooker Investments, Inc.*, 937 F.2d at 836 (" 'district court decision is not "final" for purposes of our jurisdiction when the underlying bankruptcy court decision is interlocutory and appeal to the district court is taken under the "with leave" provision of section 158(a)' ") (quoting *Bowers v. Connecticut National Bank*, 847 F.2d 1019, 1021-22 (2d Cir. 1988)).

In the present case, the district court noted its jurisdiction over the 1990 Bankruptcy Court Order under § 158(a), but it did not specify whether it viewed that Order as final or interlocutory. Thus, in order to determine whether the order of the district court was final, the above principles require this Court to determine whether or not the 1990 Bankruptcy Court Order was final.

For purposes of appealability outside of the bankruptcy context, a final order is one that conclusively determines the rights of the parties to the litigation, leaving nothing for the district court to do but execute the order. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). An order granting summary judgment on the issue of liability, but requiring a calculation of damages, is not an appealable final order. *See, e.g., Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 744 (1976). Similarly, an order determining liability but directing that an accounting be held is not final until after the accounting has been completed. *See, e.g., ARP Films. Inc. v. Marvel Entertainment Group, Inc.*, 905 F.2d 687 (2d Cir. 1990) (per curiam); 15B C. Wright, A.Miller & E. Cooper, *Federal Practice and Procedure* § 3915.2, at 271-73 (1992). Moreover, an order finding a party in contempt is not final until after the sanction has been determined. *See, e.g., Dove v. Atlantic*

Capital Corp., 963 F.2d 15, 17 (2d Cir. 1992); *Weyerhaeuser Co. v. International Longshoremen's and Warehousemen's Union, Local 21*, 733 F.2d 645 (9th Cir. 1984); 15B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3917, at 377-79 (1992).

In bankruptcy proceedings, the context of the determination of finality is different. " '[B]ecause bankruptcy proceedings often continue for long periods of time, and discrete claims are often resolved at various times over the course of the proceedings, the concept of finality that has developed in bankruptcy matters is more flexible than in ordinary civil litigation.' " *In re Hooker Investments, Inc.*, 937 F.2d at 836 (quoting *In re Chateaugay Corp.*, 880 F.2d 1509, 1511 (2d Cir. 1989)). "We have thus recognized that Congress intended to allow for immediate appeal in bankruptcy cases of orders that 'finally dispose of *discrete disputes within the larger case*.' " *In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1283 (2d Cir. 1990) (quoting *In re Johns-Manville Corp.*, 824 F.2d 176, 179 (2d Cir. 1987), and *In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (emphasis therein)). By "disputes" we do not mean merely competing contentions with respect to separable issues; rather, we apply the some standards of finality that we apply to an appeal under 28 U.S.C. § 1291. *See In re Sonnax Industries, Inc.*, 907 F.2d at 1283. Given the strong federal policy against piecemeal appeals, *see, e.g., Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956), a "dispute," for appealability purposes in the bankruptcy context, means at least an entire claim on which relief may be granted. Thus, with respect to a meritorious claim for damages, the dispute is not completely resolved until the bankruptcy court determines the amount of damages to be awarded.

In sum, for a bankruptcy court order to be final within the meaning of § 158(d), the order need not resolve all of the issues

raised by the bankruptcy; but it must completely resolve all of the issues pertaining to a discrete claim, including issues as to the proper relief. *Accord Matter of Morrell*, 880 F.2d 855 (5th Cir. 1989) (bankruptcy court order finding a creditor liable for violating the automatic stay but not determining damage due under § 362(h) is not a final order); *In re Brown*, 803 F.2d 120 (3d Cir. 1986) (district court order finding that defendant had violated the automatic stay and remanding to the bankruptcy court for a determination of damages under § 362(h) is not a final order); *see also Matter of Behrens*, 900 F.2d 97 (7th Cir. 1990) (bankruptcy court order finding a judgment creditor in contempt of the discharge order but not calculating damages is not a final order); *In re County Management, Inc.*, 788 F.2d 311 (5th Cir. 1986) (district court order remanding to the bankruptcy court for an accounting is not a final order).

The 1990 Bankruptcy Court Order in the present case does not meet this standard of finality. It did not finally dispose of the dispute between Trustee/Metromedia on the one hand and the Fugazy Parties on the other. Only when the accounting has been completed, and it is thereby determined what damages are due the Trustee and Metromedia, will the bankruptcy court have conclusively determined this separable dispute. Accordingly, though the district court had the authority to grant the Fugazy Parties leave to appeal to the district court from the bankruptcy court's interlocutory Order, the order of the district court affirming that Order was itself nonfinal within the meaning of § 158(d).

2. *The Automatic-Stay Argument*

This Court has ruled that a bankruptcy court's denial of relief from an automatic stay in bankruptcy is a final order appealable under 28 U.S.C. § 1291 because it is the equivalent of a permanent

injunction. *See, e.g., In re Sonnax Industries, Inc.*, 907 F.2d at 1284-85; *In re Chateaugay Corp.*, 880 F.2d at 1511-13; *In re Taddeo*, 685 F.2d 4, 26 n.4 (2d Cir. 1982) ("An order granting a *permanent* injunction is a final order . . . . Congress manifestly intended to treat final denial of relief from the automatic stay as a final order." (emphasis in original)). Invoking these authorities, the Fugazy Parties argue that the 1990 Bankruptcy Court Order was a final order because it was, in effect, a denial of relief from the automatic stay. This contention borders on the frivolous.

Section 362 of the Code operates, immediately upon a debtor's filing of a bankruptcy petition, to, *inter alia,* stay automatically any act to transfer control over property of the estate. 11 U.S.C. § 362(a)(3). Unless lifted by the court, the stay remains in effect until the case is concluded. *See id.* § 362(c). The Code sets forth the proper procedures to be followed by a person who desires relief from the automatic stay. Section 362(d) provides in pertinent part that the court shall grant relief from the stay in appropriate circumstances "[o]n request of a party in interest and after notice and a hearing." *See also id.* § 362(f) (court may grant relief from the stay without holding a hearing if such relief is "necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing").

Nothing in the Code suggests that a party is entitled to engage in "self-help" in derogation of the automatic stay. *See In re Computer Communications, Inc.*, 824 F.2d 725, 731 (9th Cir. 1987) ("Judicial toleration of an alternative procedure of self-help and post hoc justification would defeat the purpose of the automatic stay."). Only the court may lift the stay. Conduct that bypasses the bankruptcy court and violates the automatic stay is plainly not the equivalent of a motion asking the court to lift the stay; and a subsequent ruling by the bankruptcy court that conduct bypassing

the court was impermissible is, equally plainly, not a ruling on a motion to lift the stay.

In the present case, none of the Fugazy Parties moved in the bankruptcy court for a lifting of the automatic stay prior to William Fugazy's January 1987 transfer of the KXY License to Limousine and Roy. Nor did they inform the court of the transfer. The court did not learn of it until several months after it had occurred, and then only because the Trustee attempted to sell the License.

We find it difficult even to take seriously the Fugazy Parties' suggestion on this appeal that their March 1989 motions for summary judgment should be construed as requests for relief from the automatic stay. First, their motions were not made until more than two years after the surreptitious transfer of the License. Second, these motions were made six months after the bankruptcy court had expressly declared the transfer null and void. Further, the order invalidating the transfer had been entered on the consent of William, and after proceedings in which Roy and Limousine had participated. It is hardly surprising, therefore, that in March 1989, the Fugazy Parties did not describe their summary judgment motions as requests for a lifting of the stay. In any event, even had the motions been so described, such a characterization would have been ineffective, given the requirement that a motion for the lifting of the stay, except in circumstances not present here, must be made prior to the purported transfer of the bankrupt's property.

B. *Appealability Under § 1292*

Section 1292 of 28 U.S.C. provides for review in the courts of appeals over certain interlocutory orders and decrees of the district courts. This provision also extends to district court orders in bankruptcy proceedings, so long as the conditions imposed by

§ 1292 are met. *Connecticut National Bank v. Germain*, 112 S. Ct. at 1150. Subsection (a)(l) of § 1292, the only subsection that could arguably support appealability here, provides for review of interlocutory injunctions. It states, in pertinent part, that "the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ." 28 U.S.C. § 1292(a)(1). We conclude that none of the conditions specified by this section is applicable to the case at hand.

Plainly the 1990 Bankruptcy Court Order did not grant or modify an injunction; nor did it refuse an injunction or dissolve an injunction. For the reasons stated in Part II.A.2. above, the 1990 Bankruptcy Court Order also did not refuse to dissolve or to modify an injunction, for there was no request for such relief, timely or otherwise.

Nor do we think it can fairly be said that the Order "continu[ed]" an injunction as that term is used in § 1292(a)(1). Given the Congressional policy disfavoring piecemeal appeals, provisions such as § 1292 authorizing " 'appeals from interlocutory orders [should] be strictly limited to the unusual situations wherein such appeals are expressly authorized.' " *Sierra Club v. Marsh*, 907 F.2d 210, 214 (lst Cir. 1990) (quoting *St. Louis Shipbuilding & Steel Co. v. Petroleum Barge Co.*, 249 F.2d 905, 907 (8th Cir. 1957)). An order that "continu[es]" an injunction is one that "extends the duration of the injunction," 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3924, at 84 (Supp. 1992), that is, one entered in circumstances where, " 'without such order, the injunction would stand dissolved by lapse of the time fixed in the original order.' " *Sierra Club v. Marsh*, 907 F.2d at 213 (quoting *Dreutzer v. Frankfort Land Co.*,

65 F. 642, 644 (6th Cir. 1895)). Thus, "to be classified as an 'order[] . . . continuing' an injunction, a ruling must have a direct and demonstrable effect on the duration of a previously- issued injunction. In other words, the later order must extend or prolong the restraint." *Sierra Club v. Marsh*, 907 F.2d at 213.

The 1990 Bankruptcy Court Order had no temporal impact on the automatic stay. The Order recognized the existence of the automatic stay, but did not extend its duration. The stay remained in effect simply because § 362(c) required its continuation for the duration of the bankruptcy proceeding.

In sum, the 1990 Bankruptcy Court Order was not an order of the type that § 1292(a) makes immediately appealable.

CONCLUSION

Having examined the possible bases for appellate jurisdiction and found none applicable to the present case, we dismiss the appeal for lack of appellate jurisdiction.

APPENDIX D — MEMORANDUM AND ORDER OF UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 25, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 CIV. 5181 (KTD)

In the Matter of

FUGAZY EXPRESS, INC.,

Debtor,

ZACHARY SHIMER, Chapter 7 Trustee of FUGAZY EXPRESS, INC. and METROMEDIA COMPANY,

Plaintiffs-Appellees,

-against-

WILLIAM D. FUGAZY, FUGAZY LIMOUSINE LTD. f/k/a R.D.F. LIMOUSINE CORP. and ROY D. FUGAZY,

Defendants-Appellants.

MEMORANDUM & ORDER

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Appendix D

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KEVIN THOMAS DUFFY, D.J.:

Appellants, William D. Fugazy, Roy D. Fugazy, and Fugazy Limousine Ltd. f/k/a R.D.F. Limousine Corp. ("Limousine") pursuant to 28 U.S.C. § 158(a) (1984), appeal to this court from an

order of the Bankruptcy Court (Lifland, J.) denying their motions for summary judgment and granting cross-motions in favor of appellees Zachary Shimer, the Chapter 7 Trustee of Fugazy Express, Inc. (the "trustee") and Metromedia Company "Metromedia"), By Memorandum Decision dated May 14, 1990, the bankruptcy court held that: (1) the Debtor had an interest in the License for the period of the bankruptcy; (2) the actions of the FCC have no impact on the ruling; and (3) there was an improper post-petition transfer of property of the estate in violation of the Bankruptcy Code (the "Code"). 11 U.S.C. § 549 (1978). The judge ordered an award of costs, attorneys' fees and damages based on an accounting of the revenue received as a result of unauthorized use of the License.

FACTS

Fugazy Express (the "Debtor") was in the business of selling and servicing franchises for livery and limousine services to independent livery limousine operators who operated under the "Fugazy" name. Pursuant to the franchise agreements, the Debtor was obligated to provide radio dispatching services for the franchisees. Dispatches were broadcast over several radio frequencies, for which the Debtor obtained licenses and permits from the Federal Communications Commission (the "FCC"). The FCC sued, *inter alia*, the call sign KXY 610 and frequencies 483.68750 and 481.68750 ("the License") to Debtor, which Debtor used as part of its business. William Fugazy was formerly the controlling shareholder and officer of Debtor. His son, Roy Fugazy, was formerly Vice-President of Marketing of the Debtor and is now the controlling shareholder of Limousine.

The action originated as a voluntary filing for reorganization under Chapter 11 of the Code by the Debtor on July 8, 1986. 11

U.S.C. § *et seq.* (1978). On January 28, 1987 Limousine filed an application to the FCC for approval of an assignment of the License to it from Debtor by William Fugazy. As of March 25, 1987 the Debtor ceased operating as a debtor-in-possession and the Chapter 11 case was converted by the court to a Chapter 7 proceeding looking toward liquidation. 11 U.S.C. § 701 *et seq.* (1978). A trustee was appointed two days later. On April 15, 1987 the FCC approved the assignment of the License to Limousine. The Bankruptcy Court entered an order authorizing an auction of Debtor's property on May 18, 1987. At the auction, all right, title, and interest in Debtor's six FCC licenses, including the License at bar, were transferred to Metromedia for $500. On June 24, 1987 Metromedia learned that William Fugazy had previously conveyed the License to Limousine sometime after the Chapter 11 case commenced. This conveyance was done without the Bankruptcy Court's knowledge or permission.[1]

The Bankruptcy Court entered an order on September 10, 1987, that stated the assignment by William Fugazy of Debtor's interest in the License to Limousine was void and that Limousine held no legal or equitable rights or interests in the License. The trustee was directed to sell the License to Metromedia. William Fugazy and Metromedia were required to send a copy of the order to the FCC, taking whatever actions that the FCC requested to effectuate the order, and William Fugazy was to give a seventy-two hour written notice of any applications or filings with the FCC. Additionally, the Court dismissed Metromedia's claims against William Fugazy, except as otherwise provided in the order.

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1. On August 18, 1987, the trustee and Metromedia commenced the present adversarial action against William Fugazy, Roy Fugazy, and Limousine, contesting the transfer of the License. The FCC was not named as a party and did not take part in the Bankruptcy Court proceedings.

William Fugazy, his attorneys, and counsel to Metromedia consented to the order. The attorneys for Limousine and Roy Fugazy appeared in all relevant hearings, including that pertaining to the consent order.

On September 15, 1987 Metromedia applied to the FCC to void the assignment of the License. Limousine opposed the application and was granted a temporary authorization to use the License, pending a resolution of the dispute. Stating that the trustee was not eligible to hold a license because he was not engaged in the taxicab business, the FCC denied the trustee's application on October 14, 1987. Additionally, the FCC stated the License was in Limousine's name and no letter expressing Limousine's desire to transfer the License was received by the FCC. An application to reinstate the trustee's request was denied by the FCC. On October 27, 1987, the bankruptcy court denied a motion by William Fugazy, Roy Fugazy, and Limousine to dismiss the action. In response to Metromedia's request to void the assignment of the License to Limousine, the FCC ruled on October 28, 1988, that when the Debtor ceased its operations on December 31, 1986, the License should have been returned to the FCC and that the License was retroactively void as of that date.

DISCUSSION

At the outset, a grant of summary judgment by a bankruptcy court is subject to *de novo* review in a district court. *Lady Madonna Indus., Inc. v. Periara*, 99 Bankr. 356 (S.D.N.Y. 1989). A bankruptcy judge's findings of fact stand unless found by the district court to be clearly erroneous. *In re Skinner*, 917 F.2d 444 (10th Cir. 1990). The same standard applies to a review of an award of damages. *In re B. Cohen & Sons Caterers, Inc.*, 108 Bankr. 482 (E.D. Pa. 1989).

In view of the record and all of the submissions, I conclude

that there are no material issues in dispute which prevent a disposal of the case by summary judgment.[2]

A. The License

The Fugazys and Limousine argue that the bankruptcy court incorrectly found that the License was part of the estate and that the court lacked jurisdiction over the License because of provisions in the Federal Communications Act of 1934 (the "Act"). 47 U.S.C. § 301 *et seq.* I disagree.

The License was part of the Debtor's estate because of the broad definition of property under the Code. According to the Code, the commencement of a case in bankruptcy creates an estate, which includes property, wherever located and by whomever held, and, with certain exceptions not pertinent here, all legal and equitable interests of the debtor in property. 11 U.S.C. § 541(a)(1). The property of the estate includes tangible personal property, intangible property and cause of action. *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983).

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2. Roy Fugazy contends the court ignored his Affidavit of April 18, 1989 which sets forth: his belief that Debtor abandoned its operations and the License; his reliance on advice of "FCC counsel" that the License terminated and was no longer part of the estate; his belief that the assignment was proper; and his understanding of a common operating agreement with respect to other corporation operating under the Fugazy name.

These beliefs were determined by the bankruptcy judge not to be material in this determination. I agree. Under § 362(h) of the Code, the court may even assess monetary sanctions even when there have been inadvertent violations of the automatic stay. *Burley v. American Gas & Oil Investors (In re Heafitz)*, 85 Bankr. 274, 281-82 (Bankr. S.D.N.Y. 1988). Therefore, personal beliefs have no impact on the decision as to certain property in the estate of the Debtor.

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Licenses subject to governmental regulation are part of a bankruptcy estate. *In re Beker Indus. Corp.*, 57 Bankr. 611 (Bankr. S.D.N.Y. 1986). The mere existence of state or federal regulation is insufficient to exclude an item as property of the bankruptcy estate. The License at bar is property of the estate created by the Fugazy bankruptcy. *See In re Smith*, 94 Bankr. 220 (Bankr. M.D. Ga. 1988) (an FCC license became part of the estate upon filing chapter 7 petition); *Bernstein v. R.C. Williams*, Inc., *(In re Rocky Mountain Trucking Co.,)* 47 Bankr. 1020 (D. Colo. 1985) (a certificate enabling debtor trucking corporation to provide services as a common carrier was part of the estate and properly auctioned off after conversion from chapter 11 to chapter 7).

This holding does not conflict with the congressional mandate given the FCC, as contended by the Fugazys and Limousine. The purpose of the Federal Communications Act is to maintain control over and provide for the use of the channels of radio transmission, but "not the ownership thereof". 47 U.S.C. § 301 (1962 & Supp. 1990). However, the Act implicitly creates a property right in the license by providing "no such license shall be construed to create any right, *beyond* the terms, conditions, and provisions of the license." 47 U.S.C. § 301 (emphasis added). *See L.B. Williamson, Inc. v. Federal Communications Comm'n.*, 170 F.2d 593, 798 (D.C. Cir. 1948) (Although a radio broadcasting station license does not confer an unlimited and indefeasible property right, the right is limited in time and quality by the terms of the license, it is more than a mere privilege or gratuity, it is "a thing of value to the person to whom it is issued.").

B. Violation Of The Stay

Section 362 of the Code operates as an automatic stay of all actions and proceedings against the debtor, or any act to obtain

property of the estate. 11 U.S.C. § 362(a). There is an exception to the stay for a governmental unit to enforce that unit's police or regulatory power. 11 U.S.C. § 362(b)(4). However, as indicated by the legislative history, that exception is to be read narrowly so as to permit governmental entities to protect the public health and safety. 124 Cong. Rec. H11,092 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 124 Cong. Rec. S17,409 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini). The revocation of a license by the FCC does not affect the health or safety of the public, so there is no exemption to the stay under this section of the Code. The FCC was therefore stayed from cancelling the License without first requesting from the Bankruptcy Court relief from the automatic stay.

Alleging that there is a conflict between the FCC and the Bankruptcy Court in the disposition of the License, the Fugazys and Limousine assert that even if the License was part of the estate, the October 28, 1988 decision of the FCC made the License retroactively cease to exist as of December 1986 when the Debtor ceased operations. They argue that there could be no violation of the stay because, in light of the FCC determination that the License was retroactively void, nothing was transferred. *See* W. Fugazy Brief at 7 (the transfer was a "meaningless act which cannot properly form the basis for a contempt") I disagree.

As noted earlier, the FCC is not a party to this action. Memorandum Decision at 15. Additionally, the Bankruptcy Court specifically stated that its Memorandum Decision deals only with the Fugazys and Limousine and does not address the validity of the FCC actions as impacted by the automatic stay. *Id.* at 15-16. "Thus the License remained property of the estate, even though administratively it became subject to cancellation", according to the Bankruptcy Court. *Id.* at 20.

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C. Damages

The code provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees." 11 U.S.C. § 362(h). The Bankruptcy Court found that William Fugazy improperly transferred the License in violation of the stay provisions of the Code. William Fugazy was the controlling shareholder of the Debtor and the Transferor of the License to his son. That William Fugazy unjustifiably attempted the transfer is clear. Therefore, the damage award of one-third of the Trustee's costs and attorney's fees relative to the License litigation, through the date of the Consent Order, reflect the expenses caused by William Fugazy's wrongful conduct and are not clearly erroneous.

Roy Fugazy and Limousine argue that the complaint never alleged that either Roy Fugazy or Limousine had knowledge that the assignment might be a violation of the automatic stay. I disagree. Paragraph 40 of the Complaint alleges a "knowing, willful and intentional violation of the automatic stay by [William Fugazy] and [Limousine]." Paragraph 37 of the Complaint alleges "[a]t the time of the said purported transfers of the F.C.C. radio licenses and permit Defendants had actual knowledge of the bankruptcy proceedings and the appointment of the Trustee."

The Bankruptcy Court further found that Roy Fugazy, on behalf of himself and Limousine, knowingly violated the stay provisions of the Code. This finding is based on the fact that Roy Fugazy was a former officer of the Debtor and thus may be found to have actually or constructively known of the bankruptcy and the stay. Moreover, he received the License of the Debtor in a less than arms-length transaction with his father. Finally, the License was used by Limousine in the course of its business, the first without

the court's knowledge, then in contravention of the Bankruptcy Court's order. It follows then that both Roy Fugazy and Limousine should be liable for their aliquot portion of the damage award.

D. Equitable Relief

The Bankruptcy Court ordered the equitable relief of an accounting under New York law for the revenues derived from the unauthorized use of the License by Limousine and Roy Fugazy. Roy Fugazy and Limousine were required to account to the trustee for revenues from the date of its initial use to June 18, 1987, the date of the auction. Revenues from June 18, 1987 to the present were to be paid to Metromedia, the business that purchased the License at auction.

The trustee in bankruptcy may recover from the transferee property or "the value of such property" transferred in violation of the stay provisions of the Code. 11 U.S.C. § 550(a). Under New York law, an accounting may be available where special circumstances warrant equitable relief in the interests of justice. *Grossman v. Laurence Handprints-N.J., Inc.*, 90 A.D.2d 95, 455 N.Y.S.2d 852 (2d Dep't 1973). In this case, it is established that the License is property of the Debtor's estate, the serious nature of the misconduct is evident, and the ineffectiveness of a legal remedy is clear. It is therefore appropriate to order an accounting.

It is not then clearly erroneous to order an accounting for revenue attributable to the License from the date of its initial use, given the degree of sophistication of the parties, the serious nature of the misconduct, and the fact that Roy Fugazy profited from the use of the License. *See Burley v. American Gas & Oil Investors (In re Heafitz)*, 85 Bankr. 274, 281-82 (Bankr. S.D.N.Y. 1988) (inadvertent violators of stay and their attorneys were

sophisticated and familiar with board application of the automatic stay, they made no effort to determine the respective rights of the parties and were therefore found to have acted in "arrogant defiance of the law.")

Roy Fugazy and Limousine allege that § 550(a) of the Code prevents the award to Metromedia, because that section only provides for a recovery by a trustee. They contend that an entity to whom the trustee has transferred property of the Debtor's estate may not recover pursuant to this section. This argument fails. Rather than awarding the entire amount to the Trustee and directing that the proceeds as of the auction date be turned over, the relief merely reflects the fact of the sale of the License at auction.

Finally, there have been allegations made regarding the "unclean hands" of the Trustee and Metromedia as to their applications before the FCC. The Bankruptcy Court properly dismissed these claims *sub silentio.* When sitting as a court of equity, a bankruptcy court must observe equitable defenses. *Pepper v. Littan,* 308 U.S. 295 (1939). However, having determined that any actions before the FCC have no impact on the case at hand, allegations regarding the timing and content of FCC filings are not relevant to this appeal. The mere existence of unresolved factual issues which are not material to the outcome of the dispute will not prevent summary judgment from issuing. *See Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985) (summary judgment properly granted to employer which fired employee engaged in fraud, despite unresolved allegations of racial discrimination).

For the foregoing reasons the Memorandum Decision of the Bankruptcy Court is in all respects affirmed.

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SO ORDERED

DATED: New York, New York
February 25, 1991

KEVIN THOMAS DUFFY, U.S.D.J.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 5, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION

87 Civ. 2597 (RLC)

METROMEDIA COMPANY,

Plaintiff,

-against-

WILLIAM D. FUGAZY, TRAVELCO, INC., FUGAZY INTERNATIONAL CORPORATION, and ROY D. FUGAZY,

Defendants and Third-Party Plaintiffs,

-against-

JOHN W. KLUGE,

Third-Party Defendant.

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89 Civ. 1185 (RLC)

METROMEDIA COMPANY,

Plaintiff,

-against-

Appendix E

WILLIAM D. FUGAZY, SR., and ROY D. FUGAZY,

Defendants.

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Appendix E

JORDAN W. SIEV
ROBERT H. PEES
of Counsel

CARTER, District Judge

I.

The facts of this case up to December 22, 1988, are set out in the court's earlier opinion, *Metromedia Co. v. Fugazy*, No. 87 Civ. 2597 (RLC) (S.D.N.Y. Dec. 22, 1988) (1988 WL 140773, 1988 U.S. Dist. LEXIS 14645) (Carter, J.). However, in light of subsequent developments, and for the convenience of the reader, they are repeated here.

On March 21, 1985, plaintiff Metromedia Company ("Metromedia") entered a stock purchase agreement with defendants William D. Fugazy, Travelco, Inc. ("Travelco"), and Fugazy International Corporation ("International"), whereby Metromedia acquired 800 newly issued shares of common stock in Fugazy Express, Inc. ("Express"), representing an 80% interest in Express.[1] In July, 1986, Express filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C.§§ 1101 *et seq.*, and in March, 1987, it converted its Chapter 11 reorganization proceeding to a liquidation under Chapter 7 of the Bankruptcy Code. *Id.*§§ 701 *et seq.*

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1. Prior to the execution of the agreement, International owned 60% of the common stock of Express, and Travelco owned the other 40%. William Fugazy was Chairman of Express and President of International and Travelco at the time. It is alleged that, directly or indirectly, he owned 100% of all three corporations. Defendant Roy D. Fugazy, the son of William Fugazy, was the Secretary of International, Travelco, and Express. Third-party defendant John W. Kluge ("Kluge") is one of Metromedia's general partners.

Appendix E

Alleging that the defendants wrongfully misrepresented and/or failed to state material facts regarding the financial condition of Express, Metromedia filed the two actions consolidated here. Metromedia claimed damages for violations of § 12(2) of the Securities Act of 1933, 15 U.S.C.§ 77*l*(2); § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j; Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5; and the Racketeer Influenced and Corrupt organizations statute ("RICO"), 18 U.S.C. § 1962(b)-(d), as well as for common-law fraud, negligent misrepresentation, and breach of warranty. The predicate offenses alleged in support of the RICO claim were bankruptcy fraud under 18 U.S.C. § 152, mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C.§ 1343, and securities fraud under § 10(b), Rule 10b-5, and § 12(2).

Defendants asserted various defenses, and William Fugazy alleged a counterclaim for breach of an employment agreement between himself and Express on the theory that Express was an alter ego of Metromedia.[2] Defendants also impleaded third-party defendant John W. Kluge, claiming that he had signed a "hold harmless" agreement promising to indemnify defendants, and that he was a controlling person of Express liable under § 15 of the Securities Act and § 20 of the Securities Exchange Act. 15 U.S.C. §§ 77o, 78t.

The case came on for jury trial beginning on May 16, 1990. The court granted a directed verdict for Metromedia against William Fugazy, Travelco and International on the claim of breach of warranty, Tr. 2089, 2091, dismissed William Fugazy's counterclaim, Tr. 2087, and dismissed the defendants' controlling-person claim against Kluge. Tr. 2090. The other claims were submitted to the jury.

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2. Other counterclaims were withdrawn at trial. Transcript of Trial, May 16-June 6, 1990 [hereinafter Tr.], at 2064.

Appendix E

With respect to the predicate offense of bankruptcy fraud under the RICO claim, the bankruptcy court for this district had ruled on May 15, 1990, that William Fugazy and Roy Fugazy had engaged in acts constituting that offense. *In re Fugazy Express. Inc.* (*Shimer v. Fugazy*), 114 Bankr. 865 (Bankr. S.D.N.Y. 1990).[3] This court ruled that the bankruptcy court's findings collaterally estopped William and Roy Fugazy from denying the bankruptcy fraud, Tr. 2091, and instructed the jury to find that the defendants had committed bankruptcy fraud.

On June 6, 1990, by special verdict, the jury found William Fugazy liable under § 12(2) and RICO. As for the requisite predicate acts for the RICO claim, the jury found that William Fugazy had committed mail fraud, wire fraud, securities fraud under § 12(2) and (as instructed by the court) bankruptcy fraud. The jury rejected the plaintiff's other claims and the defendants' third-party claim.

The jury awarded $15,553,930.89 in damages. Tr. 2301, 2304. The court trebled the verdict as to William Fugazy, as provided in the RICO statute, 18 U.S.C. § 1964(c), to $46,661,792.67. Tr. 2308. The judgment was approved by the court on June 27, 1990, and entered on the docket on July 6, 1990.

On July 16, 1990, William Fugazy filed a voluntary petition with the bankruptcy court for relief under Chapter 11 of the

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3. In particular, that court held that the Federal Communications Commission radio frequency license and permit held by Express was property of the bankrupt estate, and that William and Roy Fugazy had willfully participated in an unlawful transfer of that property to R.D.F. Limousine Corp., another corporation owned and controlled by William Fugazy. 114 Bankr. at 871, 875. Metromedia, William Fugazy, and Roy Fugazy were all parties to that action, and the bankruptcy court's findings on these issues were essential to its decision of the case.

Bankruptcy Code. 11 U.S.C. § 1101 *et seq.* Consequently, the present action was automatically stayed under 11 U.S.C. § 362. Nonetheless, on July 20, the defendants (except Roy Fugazy) filed a motion with this court for judgment notwithstanding the verdict or, alternatively, a new trial. On September 4, the bankruptcy court entered an order modifying the automatic stay

> to the extent necessary . . . (A) to permit the Debtor to pursue Debtor's post-trial motion for judgment n.o.v. in the Metromedia action . . . and (B) to permit all other parties to pursue post-trial motion practice in the Metromedia Action in connection with Debtor's motion for judgment n.o.v. . . .

In re Fugazy, No. 90 B 20688 (HS), slip order at 1-2 (Bankr. S.D.N.Y. Sept. 4, 1990). With respect to Fugazy's motion for judgment n.o.v., the modification is retroactive to July 20, 1990. *Id.* at 2.

II.

In considering a motion for judgment n.o.v., the court must view the evidence in the light most favorable to the nonmoving party. *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970); *Unijax, Inc. v. Champion Int'l, Inc.*, 516 F. Supp. 941, 950 (S.D.N.Y. 1981) (Carter, J.), *aff'd*, 683 F.2d 678 (2d Cir. 1982). The motion "will be granted only if (1) there is a complete absence of probative evidence to support the verdict for the non-movant[,] or (2) the evidence is so strongly or overwhelmingly in favor of the movant that reasonable and fair minded [jurors] in the exercise of impartial judgment could not arrive at a verdict against [the movant]." *Armstrong v. Commerce Tankers Corp.*, 423 F.2d 957, 959 (2d Cir.), *cert. denied*, 400 U.S. 833 (1970). *See e.g. Unijax, supra*, 683 F.2d at 684; *Simblest, supra*, 427 F.2d at 4.

Appendix E

A motion for a new trial will not be granted "unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2803 at 32 (1973). *See e.g. Dixon v. Maritime Overseas Corp.*, 490 F. Supp. 1191, 1194 (S.D.N.Y.) (Cooper, J.), *aff'd mem.*, 646 F.2d 560 (2d Cir. 1980), *cert. denied*, 454 U.S. 838 (1981). In considering a motion for a new trial, the court may weigh the evidence and need not view it in the light most favorable to the non-movant. *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978). Nonetheless, the court must " 'abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice.' " *Id.* (quoting 6A J. Moore, *Moore's Federal Practice* ¶ 59.08[5] at 59-160, -161 (1973)).

The moving party bears the burden of establishing that it is entitled to judgment n.o.v. or a new trial. For the reasons stated below, the defendants have not met this burden, and their motion must be denied.

III.

Section 12 of the Securities Act of 1933 provides, in pertinent part:

> Any person who . . .
>
> > (2) offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the

> circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission) . . .
>
> shall be liable to the person purchasing such security from him, who may sue . . . to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security. . . .

15 U.S.C.§ 77*l*. The defendants allege that there is no evidence to support a claim that the sale of securities in question was "by means of a prospectus or oral communication" so as to be subject to § 12(2). Stuart Subotnick, one of Metromedia's general partners, testified before the jury that he had several telephone conversations with William Fugazy, in which Fugazy's object was

> [t]o convince us [i.e., Metromedia] to continue the acquisition of Fugazy Express, to explain to me about the various prospects that Fugazy Express had in various other areas that would improve the business. Generally, all of the conversations were to convince us to go forward and acquire Fugazy Express.

Tr. 148. This evidence is sufficient to support the jury's finding that the sale was "by means of . . . oral communication" within § 12(2). There is also sufficient evidence in the record to establish that William Fugazy never adequately informed plaintiff of the financial condition of Fugazy Express, so that the jury could have found that the communications at issue "omit[ted] to state a material fact necessary in order to make the statements . . . not misleading."

Defendants also argue that there was no causal relationship between the misleading statements and the plaintiffs' loss. However, causation is not required to establish a seller's liability under § 12(2). *Akerman v. Oryx Communications, Inc.*, 810 F.2d 336, 344 (2d Cir. 1987). It is sufficient that the defendants made the misleading statements in furtherance of the sale, that the plaintiff did not know of their falsity, and that the plaintiff purchased the securities.

Defendants' further contention that § 12(2) applies only to public offerings is plainly without merit. *See Pinter v. Dahl*, 486 U.S. 622 (1988); *Gould v. Ruefenacht*, 471 U.S. 701 (1985).

IV.

To maintain a civil action under RICO, the plaintiff must show that it was "injured in [its] business or property by reason of a violation of [18 U.S.C.] section 1962." 18 U.S.C. § 1964(c). Section 1962 prohibits certain activities related to a "pattern of racketeering activity." A "pattern of racketeering activity" requires at least two acts of "racketeering activity," *id.* § 1961(5), which is defined to include, among other things, the offenses of "mail fraud" and "wire fraud," and "any offense involving fraud connected with a case under title 11 [i.e., the Bankruptcy Code], [or] fraud in the sale of securities . . . punishable under any law of the United States." *Id.* § 1961(1)(B), (D).

A.

Defendants argue that there is no basis for the jury's findings that Metromedia was injured "by reason of " mail fraud and wire fraud, because there was no "causal nexus" between the racketeering activity and the alleged injury. Defendants' Mem. at

17. Specifically, defendants claim that the plaintiff did not rely on the fraudulent statements themselves, but only on the incorrect corroboration of those statements by plaintiff's counsel. *See Ashe v. 1907 Ditmas Ave. Realty Corp.*, 125 A.D.2d 432, 509 N.Y.S.2d 364, 365 (1986); *Arnold Constable Corp. v. Chase Manhattan Mortgage Realty Trust*, 59 A.D.2d 666, 398 N.Y.S.2d 422, 423 (1977).

There is, however, no evidence in the record to suggest that Metromedia's attorneys independently corroborated the information contained in the purchase agreement. An essential part of the testimony that the defendants cite on this point is contained in a deposition not admitted into evidence. Cooper Aff. ¶¶ 75-76 (deposition testimony of Stuart Subotnick). The record does contain evidence that the misrepresentations were made to Metromedia, Tr. 126-32, 145-48, that Metromedia went through with the purchase, and that Metromedia would not have gone through with the purchase if it had known the true facts. Tr. 133, 260. From this evidence, a reasonable jury could infer that Metromedia relied on defendants' representations to its detriment. Even if only a third party, and not the plaintiff, was deceived, the requirement of reliance is met if the plaintiff was injured by the fraud. *Shaw v. Rolex Watch USA. Inc.*, 726 F. Supp. 969, 973 (S.D.N.Y. 1989) (Conner, J.).

B.

Defendants argue that the plaintiffs have waived the right to assert the collateral-estoppel effect of the earlier judgment by not raising the claim of collateral estoppel in a timely manner. The bankruptcy court's decision, however, was handed down the day before the present case went to trial. Plaintiff's counsel made reference to the decision in his opening statement to the jury, Tr. 45,

and raised the issue of collateral estoppel with the court before plaintiff had rested. Tr. 842. By contrast, in the cases cited by the defendants, the party held to have waived the preclusive effect of a prior judgment had raised that issue only after a full trial on the merits and entry of a judgment against it. *See Harbeson v. Parke-Davis. Inc.*, 746 F.2d 517 (9th Cir. 1984) (first raised on appeal); *Southern Pac. Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 1011 (D.C. Cir. 1984) (first raised on motion for relief from judgment).[4]

The fact that plaintiff also presented evidence of bankruptcy fraud to the jury does not indicate that it intended to waive the benefit of collateral estoppel and relitigate the issue. Indeed, although the defendants were estopped from denying the bankruptcy-fraud claim, it was still necessary for the jury to determine whether the bankruptcy fraud was part of a pattern of racketeering activity. *See* Tr. 2243 (charge to the jury).

C.

Defendants further argue that the violation of § 12(2) is not an "offense involving . . . fraud in the sale of securities." In particular, they argue that a violation of § 12(2) is a criminal offense under § 24 of the 1933 Securities Act, 15 U.S.C. § 77x, only if the violation was "willful," and that the court failed to instruct the jury on willfulness. While this argument may be correct, defendants should have raised this matter with the court before the jury retired to begin its deliberations. The court will not grant a new trial on the basis of an erroneous jury charge when a party might have obtained

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4. Rule 8, F.R.Civ.P., which requires that a defendant's answer set forth any defense of collateral estoppel affirmatively, has no application to the use of collateral estoppel by a plaintiff.

the correct jury charge by specifically bringing the matter to the attention of the court at the proper time. *See* Rule 51, F.R.Civ.P.; *Palmer v. Hoffman*, 318 U.S. 109, 119-120 (1943); 11 C. Wright & A. Miller, *supra*, § 2805 at 39.

Defendants also argue that, by its very nature, § 12(2) does not involve "fraud." Again, the defendants should have raised this point at trial. Moreover, it hardly seems possible that a criminal (that is, "willful") violation of § 12(2), which the Court of Appeals for this circuit has characterized as an "anti-fraud measure," *Akerman, supra*, 810 F.2d at 344, might not involve "fraud." Even if it is possible, defendants have not explained how, in this particular case, they could have violated § 12(2) without engaging in fraud. In general, "the penalties allowed under . . . law are to be applied not in abstraction but to the specific facts and conditions involved." *United States v. Simon*, Crim. No. 90-143, slip op. at 9 (D.V.I. Nov. 1, 1990) (1990 WL 174602, 1990 U.S. Dist. LEXIS 14985, *11) (Carter, J.). By its terms, RICO applies to "*any* offense *involving* . . . fraud in the sale of securities," 18 U.S.C. § 1961(1)(D) (emphasis added), and thus encompasses the offense in issue.

V.

The parties are in agreement that the terms of the warranties in the stock-purchase agreement were not fulfilled. Although "reliance" is an element of breach of warranty, the only reliance that is necessary is the buyer's belief that it was purchasing the seller's promise as to the truth of the matters stated in the warranty. *CBS Inc. v. Ziff-Davis Publishing Co.*, 75 N.Y.2d 496, 503, 553 N.E.2d 997, 554 N.Y.S.2d 449, 453 (1990). In other words, reliance is established if "the express warranties are bargained-for terms of the seller." *Id.* at 506 n.5, 554 N.Y.S.2d at 454 n.5.

Reliance, in this sense, is not negated by the fact that the buyer questioned or disbelieved the accuracy of the statements prior to agreeing to the contract. *Id.* at 505-06, 554 N.Y.S.2d at 454. Rather, a warranty " 'is intended precisely to relieve the promisee of any duty to ascertain the fact for himself.' " *Id.* at 503, 554 N.Y.S.2d at 452 (quoting *Metropolitan Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946) (L. Hand, J.)).

Defendants argue that there is a triable issue as to whether the warranties were "bargained for." Even if the warranties were not the subject of explicit discussions, however, their inclusion in the written contract establishes that they were part of the bargain reached between the plaintiff and the defendants. Defendants have not alleged that they agreed to the warranties as a result of fraud, mistake or duress, and they have offered no theory that would explain how the warranties could possibly be included in the contract if Metromedia did not intend to obtain the benefit of them. Under these circumstances, it is utterly impossible that the warranties could be anything other than "bargained-for terms" of the contract.

There is no basis for defendants' contention that the jury's damage award applies only to the RICO claim against defendant William Fugazy, and not to the breach of warranty claim against all the defendants. The court specifically instructed the jury to award damages on the breach of warranty claim, Tr. 2238, and later repeated the instruction to be sure that the jury remembered to award damages for breach of warranty. Tr. 2280.

VI.

Defendants renew their objections, stated on the record, to the jury charge. Tr. 2092-2115, 2272-78. The objections remain overruled, and the court stands by its charge.

Defendants also renew their arguments, stated on the record, opposing the court's dismissal of their counterclaim and third-party claim. Tr. 2074-76. For the reasons stated on the record, the court rejects these arguments. Tr. 2087-88, 2090-91.

Defendants also argue that plaintiff's counsel should have been disqualified. The court has previously ruled on this issue and has no reason to reconsider its decision. *Metromedia, supra,* slip op. at 14.

Defendants' contention that the jury verdict was contrary to the weight of the evidence is meritless.

VII.

The court observes that the judgment contains two errors due to oversight or clerical mistake. First, three times the jury's verdict of $15,553,930.89 is $46,661,792.67, not $46,661,819.67 as stated in the judgment. Second, the judgment assesses treble damages against the corporate defendants as well as against William Fugazy, although the jury did not find the corporate defendants liable under the RICO statute. Rather, the corporate defendants are liable only for breach of warranty, and therefore the judgment against them should be for single damages.

The court is empowered to correct such mistakes on its own initiative. Rule 60(a), F.R.Civ.P. Accordingly, the judgment will be amended to hold William Fugazy, Travelco and International jointly and severally liable for $15,553,930.89, and to hold William Fugazy solely liable for the remaining $31,107,861.78.

Appendix E

VIII.

For the reasons stated above, the defendants' motion for judgment notwithstanding the verdict or alternatively a new trial is denied. On the court's own initiative, the judgment previously entered in this case is set aside, and a new judgment shall be entered in the form approved by the court.

IT IS SO ORDERED.

Dated: New York, New York
December 5, 1990

s/ Robert L. Carter
Robert L. Carter
U.S.D.J.

APPENDIX F — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 5, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMENDED JUDGMENT

87 Civ. 2597 (RLC)

METROMEDIA COMPANY,

Plaintiff,

-against-

WILLIAM D. FUGAZY, TRAVELCO, INC., FUGAZY INTERNATIONAL CORPORATION, and ROY D. FUGAZY,

Defendants and Third-Party Plaintiffs,

-against-

JOHN W. KLUGE,

Third-Party Defendant.

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89 Civ. 1185 (RLC)

METROMEDIA COMPANY,

Plaintiff,

-against-

WILLIAM D. FUGAZY, SR., and ROY D. FUGAZY,

Defendants.

These actions having come on for trial before this Court and a jury, Honorable Robert L. Carter, presiding, and the issues having

been duly tried, and certain claims and counterclaims having been withdrawn, and a verdict as to liability having been directed for plaintiff Metromedia Company ("Metromedia") on a certain claim, and the jury having answered a Special Verdict Form and in so doing having returned a verdict on the remaining claims, it is hereby

ORDERED AND ADJUDGED that final judgment on Metromedia's breach of warranty claim is granted in favor of Metromedia and against defendants William D. Fugazy, Travelco, Inc. ("Travelco") and Fugazy International Corporation ("International"), jointly and severally, and it is further

ORDERED AND ADJUDGED that final judgment on Metromedia's claim against defendant William D. Fugazy for violation of § 12(2) of the Securities Act of 1933 is granted in favor of Metromedia and against defendant William D. Fugazy, and it is further

ORDERED AND ADJUDGED that final judgment on Metromedia's claims against defendant William D. Fugazy for violation of §§ 1962(b), 1962(c) and 1962(d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO") is granted in favor of Metromedia and against defendant William D. Fugazy, and it is further

ORDERED AND ADJUDGED that final judgment on the above-described claims is granted in favor of Metromedia and against defendants William D. Fugazy, Travelco and International, jointly and severally, in the amount of $15,553,930.89, and against William D. Fugazy alone in the amount of $46,661,792.67, provided that Metromedia shall not recover more than a total of $46,661,792.67, and it is further

Appendix F

ORDERED AND ADJUDGED that Metromedia's claims against Defendant Roy D. Fugazy, and the remainder of its claims against defendants William D. Fugazy, Travelco and International are dismissed with prejudice on the merits, and it is further

ORDERED AND ADJUDGED that the counterclaims of defendants William D. Fugazy, Travelco, International and Roy D. Fugazy against Metromedia are dismissed with prejudice on the merits, and it is further

ORDERED AND ADJUDGED that the claims of third-party plaintiffs William D. Fugazy, Travelco, International and Roy D. Fugazy against third-party defendant John W. Kluge are dismissed with prejudice on the merits, and it is further

ORDERED AND ADJUDGED that the previous judgment entered in these matters is vacated, annulled, set aside and superseded by this amended judgment, provided that interest on this amended judgment is to be calculated from the date of entry of the original judgment.

APPROVED: New York, New York
December 5, 1990

s/ Robert L. Carter
Robert L. Carter
U.S.D.J.

ENTERED ON DOCKET: New York, New York
_____, 19__

_____
Clerk

APPENDIX G — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 27, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGMENT

87 Civ. 2597 (RLC)

METROMEDIA COMPANY,

Plaintiff,

-against-

WILLIAM D. FUGAZY, TRAVELCO, INC., FUGAZY INTERNATIONAL CORPORATION and ROY D. FUGAZY,

Defendants and
Third-Party Plaintiffs,

-against-

JOHN W. KLUGE,

Third-Party Defendant.

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89 Civ. 1185 (RLC)

METROMEDIA COMPANY,

Plaintiff,

Appendix G

-against-

WILLIAM D. FUGAZY, SR. and ROY D. FUGAZY,

Defendants.

These actions having come on for trial before the Court and a jury, Honorable Robert L. Carter, presiding, and the issues having been duly tried, and certain claims and counterclaims having been withdrawn, and a verdict as to liability having been directed for plaintiff Metromedia Company ("Metromedia") on a certain claim, and the jury having answered a Special Verdict Form and in so doing having returned a verdict on the remaining claims, it is hereby

ORDERED AND ADJUGED that final judgment on Metromedia's breach of warranty claim is granted in favor of Metromedia and against defendants William D. Fugazy, Travelco, Inc. ("Travelco") and Fugazy International Corporation ("International"), jointly and severally, and it is further

ORDERED AND ADJUDGED that final judgment on Metromedia's claim against defendant William D. Fugazy for violation of § 12(2) of the Securities Act of 1933 is granted in favor of Metromedia and against defendant William D. Fugazy, and it is further

ORDERED AND ADJUDGED that final judgment on Metromedia's claims against defendant William D. Fugazy for violation of §§ 1962(b), 1962(c) and 1962(d) of the Racketeering Influenced and Corrupt Organizations Act ("RICO") is granted in favor of Metromedia and against defendant William D. Fugazy, and it is further

Appendix G

ORDERED AND ADJUDGED that final judgment on the above described claims is granted in favor of Metromedia and against the defendants in the amount of $46,661,819.67, after trebling under the RICO statute, and it is further

ORDERED AND ADJUDGED that Metromedia's claims against defendant Roy D. Fugazy, and the remainder of its claims against defendants William D. Fugazy, Travelco and International are dismissed with prejudice on the merits, and it is further

ORDERED AND ADJUDGED that the counterclaims of defendants William D. Fugazy, Travelco, International and Roy D. Fugazy against Metromedia are dismissed with prejudice on the merits, and it is further

ORDERED AND ADJUDGED that the claims of third-party plaintiffs William D. Fugazy, Travelco, International and Roy D. Fugazy against third-party defendant John W. Kluge are dismissed with prejudice on the merits.

Dated: New York, New York
June 27, 1990

s/ Robert L. Carter
Robert L. Carter
U.S.D.J.

APPENDIX H — EXCERPTS OF JURY CHARGE

AFTERNOON SESSION

2:10 p.m.

(Jury present)

CHARGE OF THE COURT

(The proclamation was announced)

THE COURT: All right, ladies and gentlemen, you have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties. It becomes my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in this case.

In any jury trial, there are, in effect, two judges. I am one of the judges; the other is you, the jury. It is my duty to preside over the trial and to determine what testimony and evidence are relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable to the case.

You, as jurors, are judges of the facts. But in determining what actually happened in this case — that is, in reaching your decision as to the facts — it is your sworn duty to follow the law I am now in the process of defining for you.

You must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom

* * *

was an aider and abettor.

In order to prove aiding and abetting liability against Roy Fugazy, Metromedia must prove by a preponderance of the evidence each of the following elements:

First, that one or more of the other defendants violated Section 10(b) and Rule 10b-5;

Second, that Roy Fugazy had actual knowledge of this defendant's violation and knew that his own actions would assist the defendants in breaching Section 10(b) and Rule 10b-5; and

Third, that Roy Fugazy gave knowing and substantial assistance to that defendant in this violation of the law.

Metromedia has also brought a claim under Section 12(2) of the Securities Act of 1933 against the defendants William D. and Roy Fugazy.

The statute in question, Section 77(1) of Title 15, United States Code, provides, in pertinent part, that:

"Any person who . . . offers or sells a security by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, [2232] not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden

of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him."

In order to prevail on this claim, Metromedia must prove by a preponderance of the evidence the following elements:

First, that the defendants offered to sell or sold a security.

The term "seller," as used in Section 12(2), means either a person or entity who owns and transfers title to the securities, or a nonowner of the securities who successively solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities' owner. Mere participation in a securities transaction is not enough to make one a "seller" within the meaning of Section 12(2).

Second, that the offer or sale was made by means of a prospectus or oral communication;

Third, that the prospectus or oral communication included an untrue statement of a material fact or failed to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading;

Fourth, that Metromedia did not know of such untruth or omission; and

Fifth, that defendants used, or caused to be used, the means and instrumentalities of interstate commerce.

With regard to Roy Fugazy, Metromedia must prove an additional element by a preponderance of the evidence. In addition

to the five elements I just listed for you, Metromedia must prove that Roy Fugazy was a controlling person of Fugazy Express as I have previously defined that term for you.

The five elements, I believe, need no further definition. They are clear on their face and they have already been defined for you. It is important that you understand, however, the difference between the elements of this section, Section 12(2), and Section 10(b) and Rule 10b-5, which was just discussed. In order to recover under Section 12(2), Metromedia is not required to prove that it relied on the defendants' representation and warranties or that any omissions or untrue statements caused Metromedia's losses. Additionally, Metromedia is not required to prove that the defendants acted knowingly or intentionally in making any omissions or untrue statements.

If you find that Metromedia has proved all the elements of this claim by a preponderance of the evidence,

* * *

William Fugazy and Roy Fugazy violated the provisions of a federal statute known as RICO, which I shall refer to by its section number, which is Section 1962. There are three subsections of Section 1962 which relate to this case —Subsections (b), (c) and (d) — and I will instruct you on each of them separately.

The statute, which is Section 1962(b), (c) and (d) of Title 18 of the United States Code, prohibits:

Section (b) prohibits "any person through a pattern of

racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

Section (c) prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, from conducting or participating in the conduct of such enterprise's affairs through a pattern of racketeering activity."

And Section (d) prohibits "any person from conspiring to violate either of the two provisions above," that is, Sections (b) and (c).

William Fugazy is charged with violating all three subsections of Section 1962. Roy Fugazy is only charged with violating Subsection (d) of Section 1962.

Unlike the previous claims, to find Roy Fugazy liable under Section 1962 (d) it is not necessary for you to find that he was either a controlling person of Fugazy Express or that he knowingly and willfully aided and abetted the other defendants for the purpose of defrauding Metromedia.

You will notice that the statute that I have just read to you uses the term "racketeering." Although this term carries certain implications in our society, the use of this term in this statute and in this court should have nothing to do with your determination of whether Metromedia has established the elements of its claim. The term is only a term used by Congress to describe the statute.

Metromedia has alleged that William Fugazy violated

Subsection (b) of Section 1962. In order to prevail on this claim, Metromedia must establish four elements by a preponderance of the evidence:

First, that an "enterprise" existed;

Second, that the enterprise engaged in or had some effect upon interstate commerce.

I have already given you the definition of interstate commerce, and you should apply that definition to this claim.

Third, that William Fugazy engaged in a pattern of racketeering activity; and

Fourth, that through the pattern of racketeering activity William Fugazy acquired, maintained an interest in, or controlled the enterprise.

Now, the first element that Metromedia must prove by a preponderance of the evidence is that an enterprise existed.

An enterprise is any legal entity, such as a partnership, corporation or association. In this case, Metromedia alleges that the enterprise was one or all of the following entities: Fugazy Express, Incorporated; Fugazy International Corp.; Travelco, Incorporated; and R.D.F. Limousine Company.

Alternatively, an enterprise is a group of people who are associated together for a common purpose of engaging in a course of conduct. This group of people, in addition to having a common purpose, must have an ongoing organization, either formal or informal, and it must have personnel who function as a continuing

unit. This group of people does not have to be a legally recognized entity, such as a partnership or corporation. The group may be organized for a legitimate and lawful purpose, or it may be organized for an unlawful purpose. It may consist of individuals and corporations.

In this regard, Metromedia alleges the following as constituting the enterprise: William Fugazy; Roy Fugazy; Fugazy Express, Incorporated; Fugazy International Corp.; Travelco, Incorporated, and R.D.F. Limousine Corporation. If you find that two or more of these individuals and corporations were, in fact, an association characterized, one, by a common purpose; two, an ongoing formal or informal organization; and, three, personnel who functioned as a continuing unit, then you may find that an enterprise had existed.

The third element which Metromedia must prove is that William Fugazy engaged in a pattern of racketeering activity. A person engages in a pattern of racketeering activity if he commits at least two unlawful acts within a ten-year period and these acts are not isolated or sporadic, but, rather, related and continuous. I will refer to them as predicate acts.

In this case, Metromedia alleges that William Fugazy committed the following predicate acts: securities fraud, bankruptcy fraud, mail fraud, and wire fraud. I will describe each of these for you in greater detail.

As you have heard, Metromedia alleges that William Fugazy violated Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, and Section 12(2) of the Securities Act of 1933. A few moments ago I instructed you on the necessary elements of these violations. If you find that William Fugazy violated these statutes,

then these violations constitute predicate acts. If, on the other hand, you find that William Fugazy did not violate these statutes, then these alleged violations cannot be considered by you as RICO predicate acts.

Metromedia also alleges that William Fugazy committed bankruptcy fraud by transferring assets from Fugazy Express' bankruptcy estate to R.D.F. Limousine Corp., a corporate entity owned and controlled by Roy Fugazy.

I have determined as a matter of law that the defendants are estopped from challenging Metromedia's claim of bankruptcy fraud. Thus, you may take this claim as having been proved. However, it is still necessary for you to make a finding to that effect and to determine whether the bankruptcy fraud was part of a "pattern of racketeering activity."

Metromedia alleges that William Fugazy committed numerous acts of mail and wire fraud. All of Metromedia's claims of mail and wire fraud relate to William Fugazy's use of the mails or interstate wires in connection with the alleged securities fraud and bankruptcy fraud. You will notice that I have not previously instructed you as to mail and wire fraud, and therefore I will instruct you now.

Mail and wire fraud are similar, differing only in whether the mails or interstate wires are used in furtherance of the fraud.

The mail fraud statute can be found at Section 1341, Title 18, of the United States Code. It provides, in pertinent part, that:

"Whoever, having devised or intending to devise any scheme

or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . or knowingly causes to be delivered by mail . . . any such matter or thing, shall be guilty of mail fraud."

The wire fraud statute, Section 1342, Title 18. United States Code, provides, in pertinent part, that:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme, shall be guilty of wire fraud."

In order to establish that mail or wire fraud has been committed, Metromedia must prove the following elements by a preponderance of the evidence:

First, that William Fugazy devised or intended to devise a scheme or artifice to defraud someone of money or property by false or fraudulent pretenses, representations, or promises, or aided and abetted another in devising such a scheme;

Second, that William Fugazy devised or became a party to such a scheme or artifice knowingly, willfully, and with the intent to defraud; and

Third, that for the purpose of executing the scheme or artifice,

Appendix H

William Fugazy used or caused another to use the mails or the interstate wires, depending on whether mail or wire fraud is charged.

A "scheme or artifice" means a plan or course of conduct intended to deceive another or deprive another of something of value by means of false pretenses, representations and promises.

"To defraud" means to cheat or to deprive someone of something valuable.

A defendant causes the mails to be used when use of the mails can reasonably be foreseen. It is not necessary that the defendant himself do any of the actual mailings, and use of the mails need not be contemplated by the scheme. The item mailed need not contain a fraudulent representation or promise or request for money, but it must further the scheme in some way. And the same thing I said applies to the use of the wires.

To determine if William Fugazy engaged in a pattern of racketeering activity, you must first determine if Metromedia has proved by a preponderance of the evidence that William Fugazy committed at least two of the predicate acts which I have just described for you within a ten-year period. You may not find that Metromedia has satisfied this element unless you all agree that at least two of the same particular unlawful acts were committed by William Fugazy. For example, it is not enough if some of you think that only bankruptcy fraud and wire fraud were committed and the rest of you think that only bankruptcy fraud and mail fraud were committed. There must be at least two specific unlawful acts which you unanimously find by a preponderance of the evidence were committed by William Fugazy in order to satisfy this element.

If you determine that two or more of the just described

unlawful acts have been committed within the required ten-year period, then you must go on to determine whether Metromedia has shown whether those acts constitute a "pattern of racketeering activity," which is to say that they were neither isolated nor sporadic.

In order to show that William Fugazy's unlawful acts were neither isolated nor sporadic, Metromedia must prove two elements by a preponderance of the evidence:

First, that the acts were related to each other.

Unlawful acts are related if they have the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

Second, that the acts were continuing or constitute a threat of continuing racketeering activity.

Continuity requires either activity that is repeated over a substantial period of time — for example, a few weeks or months — or conduct that by its nature projects into the future with a threat of repetition.

If you find that the alleged enterprise existed, that the enterprise affected interstate commerce, and that William Fugazy engaged in a pattern of racketeering activity, then you must turn to the fourth element required under Subsection (b). The final element that Metromedia must prove is that William Fugazy, through the pattern of racketeering activity, acquired or maintained an interest in or control of the enterprise. To find that Metromedia has established this element, you must find by a fair preponderance

of the evidence not only that William Fugazy had some interest in or control over the enterprise, but also that this interest or control was associated with or

* * *

If you don't find that — if you find that unproved, then you go on to question 15. If you find it proved, you go to the next question, 8.

Has Metromedia proven by a preponderance of the evidence with respect to William Fugazy that he participated in the racketeering acts alleged as set forth below?

Mail fraud — proved not proved.

Wire fraud — proved, not proved.

Securities fraud — the note under that is: If you answered proved to either question number one or number two for William Fugazy, then you should also answer proved to this question.

Bankruptcy fraud. In accordance with the jury instructions given to you by me, you must answer proved to this question.

Nine, if you have found that William Fugazy has participated in two or more racketeering acts pursuant to question number 8, do you find that Metromedia has proven by - preponderance of the evidence that the two or more acts constitute a pattern of racketeering activity? Proved or not proved.

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If you find that it has been proved, you go on to question 10; not proved, you go to question 12.

Ten, if you find that William Fugazy has participated in two or more acts constituting a pattern of racketeering activity, do you find that Metromedia has proven by a preponderance of the evidence that William Fugazy has violated Section 1962(b) in that through the pattern of racketeering activity William Fugazy acquired, maintained an interest in, or controlled the enterprise? That is proved or not proved.

Question 11: If you have found that William Fugazy has participated in two or more acts constituting a pattern of racketeering activity, do you find that Metromedia has proven by a preponderance of the evidence that William Fugazy violated Section 1962(c) in that William Fugazy was associated with or employed by the enterprise, and the defendant conducted or participated in the conduct of the enterprise through the pattern of racketeering activity? Proved or not proved.

Twelve, has Metromedia proven by a preponderance of the evidence with respect to each defendant listed below that the defendant conspired to participate in the racketeering acts alleged as set forth below? William Fugazy and Roy Fugazy are listed.

(A) as to mail fraud, listing William Fugazy, Roy Fugazy; (B) wire fraud; (C) securities fraud, and the same question, if you found proved for that defendant under one or two, then you have to find proved under this one. And bankruptcy fraud, in accordance with my instructions, you have to find that that has been proved as to each defendant.

Thirteen, as to each defendant whom you have found to have

conspired to participated in two or more racketeering acts pursuant to question number 12, do you find that Metromedia has proven by a preponderance of the evidence that the two or more acts which the defendant in question conspired to commit constitute a conspiracy to commit a pattern of racketeering activity? I have listed the defendants.

Fourteen, as to each defendant that you have found to have conspired to participate in two or more acts constituting a pattern of racketeering activity, do you find that Metromedia has proven by a preponderance of the evidence that the defendant violated Section 1962(d) in that the defendant either, one, was associated with or employed by the enterprise, and conspired to conduct or participate in the conduct of the enterprise through the pattern of racketeering activity, or, two, conspired to acquire, maintain an interest in, or control the enterprise through the pattern of racketeering activity?

Question fifteen involves the defendants' claim against John Kluge.

Have the defendants proven by a preponderance of the evidence that John Kluge entered into a written agreement to hold William Fugazy, Travelco, and Fugazy given.

MR. PRINCI: I think your Honor charged them that, with respect to a pattern of racketeering activity, that they could find that there has been a substantial period of time, if there is a few weeks or months that have passed as between the acts, and we would take exception to that.

THE COURT: Okay. I stand strongly on that subject.

MR. PRINCI: That makes a horse race, Judge. We think the law is contrary to that, with all due respect.

With respect to, judge, breach of express warranty, I believe your Honor said, with respect to breach of express warranty, that the jury must determine the measure of damages that it finds sufficient to compensate Metromedia on that claim. My problem with that is that that, as I hear it, becomes a fait accompli to the jury that Metromedia is — that the breach that your Honor has found on behalf of the defendants has in fact caused damage to Metromedia, which is a quantum leap that I believe takes it outside the jury.

THE COURT: I don't believe I said that but I —I don't think I said that. Let me see.

(Pause)

THE COURT: "However, it is still your job as the

* * *

APPENDIX I — SPECIAL VERDICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

87 Civil 2597 and 89 Civ. 1185 R.L.C.

JUDGE CARTER

METROMEDIA COMPANY

Plaintiff,

vs.

WILLIAM D. FUGAZY, TRAVELCO INC. FUGAZY INTERNATIONAL CORPORATION, ROY D. FUGAZY

Defendant & Third Pty Plaintiffs

JOHN W. KLUGE

Third Pty Defendant

APPEARANCES:

FOR PLAINTIFF AND THIRD PARTY DEFENDANT:
MARTIN I. SHELTON, & DANIEL CARROLL SHEA & GOULD
827-3000

FOR DEFENDANT AND THIRD PARTY PLAINTIFFS:
ANTHONY PRINCI & STEVEN COOPER ANDERSON, RUSSELL, KILL, & OLICK
850-0700

Appendix 1

(Selection Only)
TRIAL (JURY) May 15, 1990:

BEGUN: May 16, 1990 Trial Cont'd, May 17, 1990 Trial Cont'd May 18, 1990 Trial Cont'd, May 21, 1990 Trial Cont'd, May 22, 1990 Trial Cont'd May 23, 1990 Trial Cont'd PLAINTIFF RESTS. DEFENDANT'S MOVE FOR A DIRECTED VERDICT AND TO DISMISS COMPLAINT. MOTIONS DENIED. DEC. RESERVED AS TO DEFENDANT ROY FUGAZY ONLY. May 24, 1990 Trial Cont'd, May 25, 1990 Trial Cont'd, May 29, 1990 Trial Cont'd, May 30, 1990 Trial Cont'd, May 31, 1990 Trial Cont'd, June 1, 1990 DEFENDANT'S REST. PLAINTIFF & THIRD PARTY DEFENDANT RESTS. Trial Cont'd June 1990, Trial Cont'd & Concluded on June 6, 1990 JURY VERDICT (SEE SPECIAL VERDICT FROM ATTACHED). CLERK TO ENTER JUDGMENT ACCORDINGLY. Defendant's motion to dismiss pltffs causes of action under Section 17(a) of the S.E.C. Act of 1933 & pltffs 12(2) claim is DENIED. PLTFF'S motion for a direction verdict dismissing the counterclaims (AN EXTRACT OF THE MINUTES) of the Defendant's. Defendant's Con********

CLERK CLARK D. McCULLOUGH

COURT REPORTERS Vinny Bologna, Albi Goen, Martha Hess, Bud Abramonitz, Joe Quinnoes

TO DISMISSAL OF ALL COUTERCLAIMS EXCEPT #4 based upon an employment contract as to William D. Fugazy. The Court dismissed the 4th counterclaim. Plftts motion for a directed verdict on the breach of warranty claim: Judgment for the plftt against all defendant's except Roy D. Fugazy. Third Party Deft John W. Kluge moves to dismiss the third party complaint. The motion is granted as to the first claim. The second claim The Hold-Harmless letter is denied.

Appendix 1

DEFENDANT'S SUMMATION: 9:49 AM to 11:45 AM on June 5, 1990

PLAINTIFF'S SUMMATION: 12:00 NOON to 12:50 PM on June 5, 1990

JUDGE: CHARGED THE JURY AT: 2:09 PM to 3:25 PM on June 5, 1990

MR. FOREMAN OR MADAM FORELADY HAS THE JURY AGREED UPON A VERDICT.

WOULD YOU PLEASE READ YOUR VERDICT. OR HOW DO YOU FIND. WHAT IS YOUR VERDICT.

MEMBERS OF THE JURY LISTEN TO YOUR VERDICT AS IT STANDS RECORDED.

POLLING THE JURY

MEMBERS OF THE JURY, YOU HAVE HEARD YOUR VERDICT AS IT STANDS RECORDED HERE.

JUROR #1. Israel Caoassa √

JUROR #2. Ellen Shenker √

JUROR #3. Ildefonso Reyes √

JUROR #4. Mary Sullivan √

JUROR #5. Gloria Morell √

JUROR #6. Kevin Scherer √

Appendix I

SPECIAL VERDICT

METROMEDIA COMPANY v. WILLIAM D. FUGAZY, et al.

We, the jury, unanimously make the following findings and render the following verdicts with respect to each of the claims alleged in this case:

METROMEDIA'S CLAIMS AGAINST THE DEFENDANTS

Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 Promulgated Thereunder

1. Has Metromedia proven by a preponderance of the evidence with respect to each defendant listed that the defendant violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder?

	Proved	Not Proved
William D. Fugazy	____	√
Travelco, Inc.	____	√
Fugazy International Corp.	____	√
Roy D. Fugazy	____	√

Section 12(2) of the Securities Act of 1933

2. Has Metromedia Proven by a Preponderance of the Evidence with respect to each defendant listed that the defendant violated Section 12(2) of the Securities Act of 1933?

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	Proved	Not Proved
William D. Fugazy	√	
Roy D. Fugazy		√

Common Law Fraud

3. Has Metromedia proven by a preponderance of the evidence with respect to each defendant listed that the defendant is liable for common law fraud?

	Proved	Not Proved
William D. Fugazy		√
Travelco, Inc.		√
Fugazy International Corp.		√
Roy D. Fugazy		√

4. Has Metromedia proven by a preponderance of the evidence with respect to each defendant listed in question number 3 for whom you answered proved that the defendant's conduct amounted to willful, wanton or gross negligence, or recklessness, or wanton and reckless disregard of the rights of Metromedia? Only answer this question for those defendants for whom you answered proved in question number 3.

	Proved	Not Proved
William D. Fugazy		

Appendix 1

Travelco, Inc.	_____	_____
Fugazy International Corp.	_____	_____
Roy D. Fugazy	_____	_____

Negligent Misrepresentation

5. Has Metromedia proven by a preponderance of the evidence with respect to each defendant listed that the defendant is liable for negligent misrepresentation?

	Proved	**Not Proved**
William D. Fugazy	_____	√
Travelco, Inc.	_____	√
Fugazy International Corp.	_____	√
Roy D. Fugazy	_____	√

Racketeer Influenced and Corrupt Organizations ("RICO")

6. Has Metromedia proven by a preponderance of the evidence that an enterprise existed?

Proved √ Not Proved _____

If you find that metromedia has sustained its burden of proof as to question 6, proceed to question 7. If not, proceed to question 15.

Appendix I

7. Has Metromedia proven by a preponderance of the evidence that the enterprise that you have found to exist had some effect on interstate commerce?

Proved __√__ Not Proved _____

If you find that metromedia has sustained its burden of proof as to question 7, proceed to question 8. If not, proceed to question 15.

8. Has Metromedia proven by a preponderance of the evidence with respect to William Fugazy that he participated in the racketeering acts alleged as set forth below?

A. Mail Fraud

Proved __√__ Not Proved _____

B. Wire Fraud

Proved __√__ Not Proved _____

C. Securities Fraud

If you answered proved to *either* question number 1 or question number 2 for William Fugazy, then you should also answer proved to this question.

Proved __√__ Not Proved _____

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D. Bankruptcy Fraud

In accordance with the Jury Instructions given to you by Judge Carter, you must answer proved to this question.

Proved __√__ Not Proved _____

9. If you have found William Fugazy to have participated in two or more racketeering acts pursuant to question number 8, do you find that Metromedia has proven by a preponderance of the evidence that the two or more acts constitute a pattern of racketeering activity?

Proved __√__ Not Proved _____

If you find that Metromedia has sustained its burden of proof as to question 9, proceed to question 10. If not, proceed to question 12.

10. If you have found that William Fugazy has participated in two or more acts constituting a pattern of racketeering activity, do you find that Metromedia has proved by a preponderance of the evidence that William Fugazy violated Section 1962(b) in that through the pattern of racketeering activity William Fugazy acquired, maintained an interest in, or controlled the enterprise?

Proved __√__ Not Proved _____

11. If you have found that William Fugazy has participated in two or more acts constituting a pattern of racketeering activity, do you find that Metromedia has proven by a preponderance of the evidence that William Fugazy violated Section 1962(c) in that William Fugazy was associated with or employed by the

enterprise, and the defendant conducted or participated in the conduct of the enterprise through the pattern of racketeering activity?

Proved √ Not Proved _____

12. Has Metromedia proven by a preponderance of the evidence with respect to each defendant listed that the defendant *conspired* to participate in the racketeering acts alleged as set forth below?

A. Mail Fraud

	Proved	Not Proved
William D. Fugazy	√	
Roy D. Fugazy		√

B. Wire Fraud

	Proved	Not Proved
William D. Fugazy	√	
Roy D. Fugazy		√

C. Securities Fraud

If you answered proved to *either* question number 1 or question number 2 for either defendant, then you should also answer proved to this question for that same defendant. You should also answer proved to this question for either defendant if you find

that the defendant in question conspired to commit securities fraud.

	√ Proved	Not Proved √
William D. Fugazy	____	____
Roy D. Fugazy	____	____

D. Bankruptcy Fraud

In accordance with the Jury Instructions given to you by Judge Carter, you must answer proved to this question for each defendant.

	Proved	Not Proved
William D. Fugazy	√	____
Roy D. Fugazy	____	√

13. As to each defendant whom you have found to have conspired to participated in two or more racketeering acts pursuant to question number 12, do you find that Metromedia has proven by a preponderance of the evidence that the two or more acts which the defendant in question conspired to commit constitute a conspiracy to commit a pattern of racketeering activity?

	Proved	Not Proved
William D. Fugazy	√	____
Travelco, Inc.	____	√

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If you find that Metromedia has sustained its burden of proof as to question 13, proceed to question 14. If not, proceed to question 15.

14. As to each defendant that you have found to have conspired to participated in two or more acts constituting a pattern of racketeering activity, do you find that Metromedia has proven by a preponderance of the evidence that the defendant violated Section 1962(d) in that the defendant *either*: 1) was associated with or employed by the enterprise, and conspired to conduct or participate in the conduct of the enterprise through the pattern of racketeering activity, *or* 2) conspired to acquire, maintain an interest in, or control the enterprise through the pattern of racketeering activity?

	Proved	**Not Proved**
William D. Fugazy	√	
Roy D. Fugazy		√

THE DEFENDANT'S CLAIMS AGAINST JOHN KLUGE

The Hold-Harmless Letter

15. Have the defendants proven by a preponderance of the evidence that John Kluge entered into a written agreement to hold William Fugazy, Travelco and Fugazy International harmless for all outstanding guarantees that would have remained in effect after the sale of Fugazy Express?

Proved _____ Not Proved √

Appendix I

DAMAGES

16. What amount (if any), in dollars, do you find will fairly and adequately compensate Metromedia for the damage it suffered?

$15,553,930.89

17. If you answered proved with respect to at least one of the defendants for question number 4, what amount of punitive damages (if any), in dollars, do you award Metromedia?

$ 0

APPENDIX J — MEMORANDUM DECISION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 14, 1990

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No.
86 B 11206 (BRL)

In the Matter of
FUGAZY EXPRESS, INC.,

Adv. Pro. No.
87-5883A

ZACHARY SHIMER, Chapter 7 Trustee of FUGAZY EXPRESS, INC., and METROMEDIA COMPANY,

Plaintiffs,

-against-

WILLIAM D. FUGAZY, FUGAZY LIMOUSINE LTD. f/k/a R.F.D. LIMOUSINE CORP. and ROY D. FUGAZY,

Defendants.

Appendix J

MEMORANDUM DECISION ON MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

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30 Rockefeller Plaza
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By: Zachary Shimer, Esqs., of Counsel

Shea & Gould, Esqs.
Attorneys for Metromedia Company
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By: Daniel L. Carroll, Esq., of Counsel
-and-
Thomas K. Reilly, Esq., of Counsel

Anderson Russell Kill & Olick, P.C.
Attorneys for William D. Fugazy
666 Third Avenue
New York, New York

By: Arthur S. Olick, Esq. of Counsel

Garrity & McCusker, Esq.
Attorneys for Roy Fugazy and Fugazy Limousine Corporation
605 Third Avenue
New York, New York

Appendix J

By: James Lawrence Garrity, Esq., of Counsel
-and-
George Kuntu-Blankson, Esq., of Counsel

BEFORE: Hon. Burton R. Lifland, Chief U.S. Bankruptcy Judge

BACKGROUND

On July 8, 1986 Fugazy Express, Inc. (the "Debtor") filed a voluntary petition for relief under Chapter 11, Title 11, United States Code, U.S.C. § 101 *et seq.* (the "Bankruptcy Code" or "Code"). The Debtor was engaged in the business of selling and servicing franchises for livery and limousine services to independent livery limousine operators who conducted their business using the "Fugazy" name. Under the franchise agreements, the Debtor was obligated to provide radio dispatching services on behalf of the franchisees. The radio dispatch transmissions were broadcast over various radio frequencies, for which the Debtor obtained the requisite licenses and permits from the Federal Communications Commission (the "FCC").

On March 25, 1987 this Court entered an Order converting the reorganization proceeding to a liquidation proceeding under Chapter 7 of the Code. Zachary Shimer was immediately appointed interim trustee of the Debtor's estate and became the permanent trustee (the "Trustee") at the meeting of the creditors held on June 17, 1987. On May 18, 1987 this Court entered an order authorizing the then interim Trustee to retain Jackson Hecht & Assoc., Inc. as auctioneers to conduct a sale of the Debtor's property. An auction was held on June 18, 1987. After the auction the Trustee transferred and assigned all of the Debtor's right, title and interest in and to the debtor's FCC licenses and permits to Metromedia Company ("Metromedia"), the only bidder on the licenses, for the sum of $500.

Appendix J

Without knowledge or authorization of this Court (*see* § 363 restrictions on transfer of property of the estate), and sometime prior to the auction sale, William D. Fugazy ("William Fugazy"), purporting to act in his capacity as Chairman of the Board of the Debtor, assigned and transferred to Fugazy Limousine Ltd., formerly known as R.D.F. Limousine Corp. ("Limousine") the following FCC radio frequency license and permit (the "License"):

Call Sign	Frequencies
KXY 610	478.68750 481.68750

There is nothing in the record before this Court which indicates that the Debtor received any consideration for this assignment and transfer. At the time of the transfer, William Fugazy had no management responsibility for the Debtor, nor did he act in any capacity other than that occasioned by his status as a board member. The controlling shareholder of Limousine was Roy D. Fugazy ("Roy Fugazy"), who was aiso a former officer of the Debtor and the son of William Fugazy. Roy Fugazy accepted the unauthorized transfer of the License with knowledge of the bankruptcy and thereafter used the License in his business.

On January 28, 1987, Limousine filed an application requesting FCC approval for the assignment of authorization of the License from the Debtor to Limousine. The application was originally returned for lack of information, but was resubmitted. On April 15, 1987, the FCC consented to the assignment of the License and a new license in the name of Limousine was issued on April 30, 1987.

On August 18, 1987, the Trustee and Metromedia (the

"Plaintiffs") commenced the present adversary proceeding against William Fugazy, Roy Fugazy, and Limousine (the "Defendants"). The Plaintiffs requested this Court to enter an order: (i) declaring the transfer by William Fugazy to Limousine to be null and void and directing the Trustee to effectuate the sale of the FCC License to Metromedia; (ii) declaring the transfer by William Fugazy to be in violation of the automatic stay and therefore null and void; (ii) finding all Defendants in contempt of court for a willful and flagrant violation of the automatic stay; (iv) declaring the transfer by William Fugazy to be an unauthorized post-petition transfer and therefore null and void under § 549 of the Code; (v) enjoining Limousine from using the License pending resolution of the complaint; and (vi) requiring Defendants to account for all monies received by them incident to the use of the License.

On September 10, 1988, this Court entered an order (the "Consent Order") that acknowledged the concession of William Fugazy that he acted without authority in purportedly assigning and transferring the Debtor's interest in the License to Limousine. The order also provided that the alleged assignment was null and void, and that Limousine acquired no legal or equitable rights or interests in the License. In addition, the order authorized and directed the Trustee to effectuate the sale of the License to Metromedia. The order was consented to by William Fugazy, the attorneys for William Fugazy, and the attorneys for Metromedia. The attorney for Limousine and Roy Fugazy appeared in this adversary proceeding at all pertinent hearings, including the one relative to the Consent Order, and was present in court and understood that the Consent Order signed by this Court declared that the assignment from the Debtor to Limousine was null and void.[1] Although substantive rights of Limousine and Roy Fugazy

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1. Hearing Transcript, April 25, 1989, pp. 36-37.

were adjudicated pursuant to the Consent Order, they never sought to modify it, or to appeal the order.

On August 18, 1987, an application for assignment of the License to the Trustee was filed by an attorney for Metromedia in the name of the Trustee. An FCC form letter dated October 14, 1987, returned the application for the following checked reasons:

There are several problems with your application:

> 1) You are attempting to assign station KXY 610. This station is licensed to RDF Limousine Corp. Fugazy Express is no longer the licensee. In order to assign the station the Commission would require a letter from RDF Limousine expressing their desire to transfer the license.
>
> 2) As an individual trustee you are "not" eligible to hold a license in the Taxicab Radio Service. Only those engaged in the taxi business may be licensed in the Taxicab Service. Therefore, you should reconsider your request to license.

Metromedia's attorney requested reinstatement of this application, but on March 3, 1988, the FCC denied the request and dismissed the application.

On October 27, 1987, this Court denied a motion to dismiss this adversary proceeding for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable herein pursuant to Bankruptcy Rule 7012(b)(6), and held that Metromedia was a proper party to this proceeding.

Appendix J

In response to a petition to revoke the assignment of FCC License KXY 610 from the Debtor to Limousine, by letter dated October 26, 1988, the FCC stated:

> While the rights and obligations of the various parties *vis-a-vis* each other may be somewhat complex, their obligations to the Commission are quite simple. Fugazy Express, Inc., licensee of record, assigned the license for KXY-610 to R.D.F. Limousine, who then became the licensee of record for our purposes. Information submitted to us, the Consent Order of the Bankruptcy Court in particular, casts doubt upon the validity of this transaction, and would under other circumstances require an administrative inquiry on our part. Here, however, the particular facts before us make such action unnecessary.
>
> Affidavits submitted with the pleadings establish that KXY-610 ceased operations in December, 1986. Under Section 90.157 of our Rules, 47 C.F.R. § 90.157, the license for KXY-610 has therefore cancelled and must be returned to the Commission. The frequencies will then be made available for reassignment.

It is undisputed that Limousine used the frequencies under License at least since the time of the attempted unauthorized assignment to it from William Fugazy, and continued to use the frequencies under the License until December 1, 1988, when the FCC granted a new Radio Call Sign License (WQU 550) for these frequencies to Limousine.

Appendix J

On March 1, 1989, Limousine and Roy Fugazy moved this Court for summary judgment and for sanctions against the Plaintiffs. Subsequently, both the Trustee and Metromedia, represented by separate counsel, cross-moved for summary judgment and sanctions against the Defendants. In addition, William Fugazy crossed-moved for summary judgment against the Plaintiffs.

ISSUES

1) Whether summary judgment is proper in this case.

2) Whether the Debtor had any interest in the FCC License for Radio Call Sign KXY 610.

3) Whether the actions of the FCC have any impact on this ruling.

4) Whether there was an improper post-petition transfer of property of the estate under Code § 549(a).

5) Whether the nature and measure of relief that the Trustee and/or Metromedia is entitled to includes costs and attorney's fees, an accounting, and/or an award of monetary damages?

DISCUSSION

I. SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure[2] states that

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2. Bankruptcy Rule 7056 provides: "Rule 56 FR Civ P applies in adversary proceedings."

summary judgment shall be granted to the moving party if the court determines that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d. 265, 267 (1986). *See also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Matsushita Electric Indusrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Under Local Bankruptcy Rules[3] a party to a motion for summary judgment is required to set out the material facts as to which no genuine issue exists. Based on the parties 13(h) statements, this Court concludes that there are no material issues of fact which are in dispute, and based on the pleadings and submissions of the parties grants the Plaintiffs' motion for summary judgment as a matter of law. The following discussion details this Court's reasoning in reaching its holding.

II. FOR THE PERIOD IN QUESTION, THE ESTATE HAD A PROPERTY INTEREST IN THE FCC LICENSE

Section 541(a)(1) of the Code provides:

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3. Local Bankruptcy Rule 13(h) provides that upon a motion for summary judgment the moving party is required to submit "a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried." The party opposing a motion for summary judgment must include "a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried."

Rule 13(h) further provides that "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

Appendix J

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, *all legal or equitable interests* of the debtor in property as of the commencement of the case.

(emphasis added).

In order to reflect the realities of modern commercial life, the concept of property embodied in the Code is clearly and appropriately an expansive and fluid concept which must be defined in connection with the policies underlying the Code. Therefore, at the threshold, it is necessary to examine whether a radio call sign license is "property" of the bankruptcy estate. The bankruptcy estate consists of all property of the debtor including not only tanaible personal property, but also intangible property and causes of action. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983).

An FCC license is a permit under the Communications Act (the "Act")[4] which gives the holder the right to broadcast on an assigned frequency consistent with FCC rules and regulations. The purpose of the Act is to regulate the limited number of available radio frequencies. The rights afforded to the licerse-holder are rights subject to the continuing supervision of the FCC. Section 301 of the Act provides:

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4. Title 47, United States Code, U.S.C. § 151 *et seq.*

Appendix J

> It is the purpose of this chapter, among other things, to maintain the control of the United States over the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

Notwithstanding § 301 of the Act, it has been held that "upon the filing of the Chapter 7 bankruptcy petition, [the] Debtor's interest in [an] FCC license became property of the bankruptcy estate." *In re Smith*, 94 Bankr. 220, 221 (Bankr. M.D. Ga. 1988). *Smith* is similar to the case at hand in that it concerned whether a creditor possessed a security interest in an FCC license which was the primary asset remaining in the bankruptcy estate. In *Smith*, the court found that an FCC license is property of the estate as a matter of law.

Defendants assert that a license which is subject to regulation by an administrative agency such as the FCC is not property within the purview of § 541 of the Code, and is therefore not subject to the bankruptcy court's jurisdiction. Defendants rely upon *In re D.H Overmyer Telecasting Co.*, 35 Bankr. 400 (Bankr. N.D. Ohio 1983) to support this premise. The court in *Overmyer* held that the debtor's FCC license was not property of the estate as commonly

defined, due to the fact that the FCC retained continuing and exclusive jurisdiction over any subsequent transfer of the license by the debtor. *Id.* at 401. Defendants also cite *In re Braniff Airways. Inc.*, 700 F.2d 935 (5th Cir. 1983), which held that the debtor's airport landing slots were neither licenses nor property rights, but instead were Federal Aviation rules which imposed restrictions on the use of the debtor airline's property, its airplanes.

However, the rationale of both the *Overmyer* and the *Braniff* cases was rejected by this district in the well reasoned opinion *In re Beker Indus. Corp.*, 57 Bankr. 611 (Bankr. S.D.N.Y 1986). In *Beker*, the court found that the debtor's ability to truck phosphate ore on public roads pursuant to an administrative agency's order was a license so as to be property of the estate within the meaning of § 541, stating that:

> Both of these cases [*Overmyer* and *Braniff*] failed to consider either the legislative history to § 541 of the Code which defines property of an estate or *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204, 103 S.Ct. 2309, 2313, 76 L.Ed.2d 515 (1983), where the Supreme Court, upon examination of that history, observed that "Congress intended a broad range of property to be included in the estate". Following *Whiting Pools* and relying on it, the district court in *Bernstein v. B.C. Williams, Inc. (In re Rocky Mountain Trucking Co.)*, 47 B.R. 1020 (D.Colo. 1985) held that a state agency issued certificate of public convenience and necessity enabling a trucking firm to serve as a common carrier throughout the state is property of the estate, even though dormant

> pursuant to agency rules, and therefore consideration by the commission of post-petition failure to utilize the license was wit~in the automatic stay provided by § 362(a)(3) of the Code. Other courts are in accord in holding similar permits to be property of an estate. *See e.g., In re Golden Plan of California, Inc.*, 37 B.R. 167 (Bankr. E.D.Cal. 1983); *In re Hodges*, 33 B.R. 51 (Bankr. E.D.Pa. 1983); *In re R.S. Pinellas Motel Partnership*, 2 B.R. 113, 5 B.C.D. 1292, 1 C.B.C.2d 349 (Bankr. M.D.Fla. 1979).

In re Beker Indus. Corp., 57 Bankr. at 622.

Further, the court in *Beker* specifically rejected the proposition that the mere existence of state or federal regulation precludes property rights from coming within the wide horizon of property of the bankruptcy estate by ruling that:

> To hold otherwise would be to rule . . . that a property interest subject to regulation, as nearly all are, or conditioned upon regulatory requirements, is not property of an estate. Such a ruling would contemplate that all licenses and permits issued by governmental units are not property of the estate. . . .
>
> Far more consistent with general Congressional intent as found by *Whiting Pools* is to construe such rights as within the definition of property of an estate, to recognize, as discussed *infra*, that valid

> regulation continues post-petition as provided in 28 U.S.C. § 959(b) (1978) and to apply the evident Congressional intent, reflected in § 362(b)(4) and (b)(5) of the Code that good faith enforcement by governmental units of valid regulation is to be permitted to continue.

Id. 57 Bankr. at 622.

In addition, this Court finds an opinion of the Bankruptcy Court of the District of Massachusetts persuasive in its analysis of the *Braniff* case. The opinion stated:

> Movant has suggested in a recent pleading that the Fifth Circuit opinion *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983) is authority for his position that the June 30, 1981 order approving the sale of the radio station was error. *Braniff* is not contra authority. The court noted the question of whether 11 U.S.C. § 363(b) authorizes a sale of all of a debtor's assets and cited *In re WHET, Inc., supra*, for the proposition that courts have so construed § 363(b). Immediately thereafter the Fifth Circuit stated: "We need not express an opinion on this controversy because we are convinced that the [subject] transaction is much more than the 'use, sale or lease' of *Braniff's* property authorized by § 363(b)." The court concluded that the *Braniff* proposal was actually in the nature of a fully integrated plan of reorganization and not just a sale.

In re WHET, Inc., 33 Bankr. 424, 429 (Bankr. D.Mass. 1983).

In any event, the First Circuit Court of Appeals has recently questioned the continuing applicability of the *Braniff* case because of administrative developments since the decision was rendered. The court stated:

> In light of [14 C.F.R. § 93.221(a)(1989)], which did not exist when the Fifth Circuit decided *In re Braniff*, we must conclude that by granting carriers the right to buy and sell slots with the intent of maximizing reliance on market forces and minimizing government involvement regarding slot distribution, the FAA grants to carriers a limited proprietary interest in slots. *See Continental Air Lines Inc. v. Hillblom (In re Continental Air Lines Inc.)*, 61 B.R. 758, 784 n. 51 (S.D.Tex. 1986). We reached this conclusion despite the FAA's provision that "[s]lots do not represent a property right but represent an operating privilege subject to absolute FAA control. . . ." *See* 14 C.F.R. § 93.223(a)(1989). This declaration by the FAA does not detract from the reality that a market exists in which carriers may buy and sell these slots. We cannot deny that a carrier possesses a proprietary right in allocated slots, even if limited as to the superior rights of the FAA.

In re Gull Air, Inc., 890 F.2d 1255, 1260 (1st Cir. 1989). *See also, In re McClain Airlines, Inc.*, 80 Bankr. 175, 178 (Bankr. D.Ariz. 1987) (debtor possessed property rights in slots, but lost those rights when the FAA had properly and permanently withdrawn them); *In re American Central Airlines, Inc.*, 52 Bankr. 567, 570-

71 (Bankr. N.D.Iowa 1985) ("possession of an airport slot also entitles the holder to airport access . . ." and that "[s]uch a possessory interest must constitute property of the estate."). Thus, at the very least, the Debtor had a proprietary interest in the License even if limited by the regulatory authority of the FCC. This proprietary interest is not subject to defeasance by the extra-legal activities of William Fugazy, Roy Fugazy, and Limousine.

Finally, this Court has, pursuant to its Consent Order, already determined *vis-a-vis* the Trustee, William Fugazy, Roy Fugazy, and Limousine the issue of whether the License is property of the debtor's bankruptcy estate. That very premise was implicit in the order entered in this case on September 10, 1987 which declared that the purported assignment and transfer of the License by William Fugazy to Limousine was null and void. The License, a valuable economic asset, is clearly subject to the Chapter 7 Trustee's equitable power of marshalling assets for the benefit of creditors. It is undisputed that the License is a right or interest subject to regulation, but pursuant to § 541 of the Code, the interest that the Debtor had in the License became property of the estate upon the filing of the bankruptcy petition.

III. THE ACTIONS TAKEN BY THE FCC

Although the FCC is not a party to this adversary proceeding, and the question of a violation of the automatic stay by the FCC is not before this Court, the Defendants seek to use the post-transaction administrative actions of the FCC in an attempt to validate prior acknowledged impermissible conduct and to bolster their arguments for summary judgment. Accordingly, the discussion which follows is only for the purpose of dealing with the Defendant's arguments, and is not determinative of the validly of the FCC actions as they are impacted by the application of the automatic stay.

Appendix J

Section 362 of the Code, in pertinent part, states:

> (a) Except as provided in subsection (b) of this section, a petition filed under Section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of —
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> >
> > * * * *
> >
> > (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate,
> >
> > * * * *
>
> (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 USC 78eee(a)(3)), does not operate as a stay —
>
> * * * *

> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . . .

The Defendants have moved for summary judgment alleging that the License was forfeited upon the cessation of Debtor's business on December 31, 1986, and that such automatic defeasance prevented any further transfer of the License to the Trustee as part of the bankruptcy estate.

Defendants admit that William Fugazy transferred the License to his son Roy Fugazy's limousine business sometime after filing a voluntary Chapter 11 petition on July 8, 1986. However, they now contend that the FCC letter of October 26, 1988, approximately a year and a half later, rendered the License worthless as of Debtor's cessation of business. That letter stated that since the Debtor ceased operations in December 1986, under 47 C.F.R.§ 90.157[5]

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5. § 90.157 Discontinuance of station operation.

(a) If a station licensed under this part discontinues operation on a permanent basis, the licensee shall forward the station license to the Federal Communications Commission, Gettysburg, Pennsylvania 17325 for cancellation. Alternatively, the licensee may notify the Commission by checking the appropriate box on Form 405-A that he/she has discontinued station operation and requests license cancellation. The form 405-A shall be sent the Commission's offices in Gettysburg, Pennsylvania.

(b) Licensees whose licenses are due for renewal and who have received the Form 574-R in the mail from the Commission, shall use the appropriate box on that Form the [sic] notify the Commission that they have discontinued station operation and wish to cancel their license.

(Cont'd)

radio call license KXY 610 was cancelled.[6]

The FCC purportedly established that use of the License had "ceased" in December, 1986. FCC Regulation § 90.157 (*see*, footnote 5) states that a license is not cancelled until the licensee has notified the FCC of a permanent discontinuance of operations, or that the station has not operated for a period of one year. Here, there has been no indication that the FCC was ever notified of a "permanent discontinuance" or that the dormant period had run. In addition, the presumption occasioned by non-operation for one year has no bearing on this case since the auction of the License took place on June 18, 1987, less than six months after the date on which the FCC determined the use of the License had ceased. Further, Limousine continued to use the Debtor's License, although it had obtained no court authority to do so. Indeed, continuous use was maintained by the usurper, and therefore, on the date of the sale of the License by the Trustee, the License was property of the estate.

(Cont'd)

(c) For the purposes of this section, any station which has not operated for 1 year or more is considered to have been permanently discontinued.

6. The letter from the FCC dated October 26, 1988, stated:

> Affidavits submitted with the pleadings establish that KXY-610 ceased operations in December, 1986. Under Section 90.157 of our Rules, 47 C.F.R. § 90.157, the license for KXY-610 has therefore cancelled and must be returned to the Commission.

It should be noted the neither the letter nor § 90.157 (see footnote 5) specifies when the effective date of cancellation is under the FCC Regulations. In this case, it could have been the date of the FCC letter, one year after the discontinuance of operations, or the date of the discontinuance of operations.

Appendix J

The Second Circuit has recently considered the breadth of the automatic stay pursuant to Code § 362(a) as it applies to governmental entities. In *In re Parr Meadows Racing Association, Inc.*, 880 F.2d 1540 (2d Cir. 1989), the court, in discussing one of the paramount policies of the Code, equality of distribution to all creditors, stated that "[t]his equitable treatment requires that all creditors, both public and private be subject to the automatic stay." *Id.* at 1545.

As quoted above, pursuant to § 362(a)(3) of the Code, the automatic stay applies to all entities and operates to prevent an administrative proceeding against the debtor, unless the exception in Code § 362(b)(4) is applicable. Code § 362(b)(4) is a very limited exception to the automatic stay. The legislative history states:

> This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to prctect a pecuniary interest in property of the debtor or property of the estate.

124 Cong. Rec. H11,092 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 124 Cong. Rec. 517,409 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini). Therefore, the FCC, an administrative agency, was stayed from rendering any administrative cancellation of the license without first moving for relief from the automatic stay. In *In re Rocky Mountain Trucking Co., Inc.*, 47 Bankr. 1020 (Bankr. D.C. Colo. 1985) the court held that "[c]onsideration of postpetition non-use of the Certificate in the determination of whether the Certificate is now dormant *is* an

act to obtain property of the estate, and is therefore stayed." *Id.* at 1021 (emphasis added).

In the present case, at the time of the filing the License was property of the Debtor's estate and had remained so. The FCC was subject to the automatic stay and precluded from rendering any administrative cancellation of the License once the Debtor filed a petition in bankruptcy, unless the action was taken to protect the public health or safety.[7] Since § 362 of the Code stays all enforcement activity automatically, the 1988 FCC letter is accordingly without effect. *See e.g., In re Garnett*, 47 Bankr. 170 (Bankr. E.D.N.Y. 1985). Thus the License remained property of the estate, even though administratively it became subject to cancellation.

If this Court were to adopt Defendant's argument giving retroactive effect to the FCC's 1988 letter cancelling the License, the result would be an inappropriate cure for a violation of the automatic stay. The Defendant's present contention that the license was forfeited upon Debtor's cessation of business, and thus somehow metaphysically evaporated from the estate, is without merit. This case is factually distinguished from *In re Gull Air, Inc., supra,* in which the court held that an *automatic, nondiscretionary* act of the FAA did not violate the automatic stay. *Id.* 890 F.2d at 1261. Here, if the FAA's letter of October 26, 1988 were to have any effect, it would have to be interpreted as a retroactive post-petition determination that the License's use had been permanently discontinued as of December, 1986. That finding would involve a determination of intent, which is clearly not an automatic, nondiscretionary act. Given that the purchaser, Metromedia, is a

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7. There has been no suggestion in the record that the FCC actions in regard to cancelling the Debtor's FCC License was in any way prompted by a concern for the public health or safety.

well-known communications entity, the FCC would be hard pressed to find a timely transfer to it as constituting an intent to keep the use of the License dormant.

A radio call sign license is an economic asset subject regulation in the public interest by the FCC. In a case similar to the present one, *LaRose v. F.C.C.*, 494 F.2d 1145 (D.C. Cir. 1974), the court stated that "the Commission [FCC] has gradually evolved a special policy for the disposition of a license held by a trustee in bankruptcy." 494 F. 2d at 1147 . The *LaRose* Court went on to say that:

> [I]n recognition of the public interest in protecting innocent creditors, the Commission will approve the sale and assignment of the bankrupt's license when the transaction will not unduly interfere with the F.C.C. mandate to insure that broadcast licenses are used and transferred consistently with the Communications Act.

Id. at 1148. As stated in *LaRose*, the FCC could approve the sale or assignment to Metromedia as long as it was transferred consistent with the Act, and this was a valuable interest held by the estate that should not be lost absent this Court's grant of relief from the automatic stay. *Id.* at 1147.

To the extent that the FCC may have acted in derogation of the automatic stay, that activity has no impact on the outcome here. Neither the Plaintiffs nor the Defendants have made the FCC a party to this proceeding, and instead, Plaintiffs have opted to appear before the FCC to seek to strip Roy Fugazy and Limousine of the License. In any event, the FCC recognized the doubtful

validity of the purported assignment (*See*, FCC letter of October 26, 1988) and instead based its license grant to Limousine on a presumed lapse of use. While this determination may now be binding upon the parties, it is irrelevant to this Court's assessment of rights, liabilities, and damages left in the wake of the original illegal and defective transaction.

IV. THE POSTPETITION TRANSFER OF THE LICENSE WAS IMPROPER

Section 549(a) of the Bankruptcy Code provides:

> (a) Except as provided in subsections (b) or (c) of this section, the trustee may avoid a transfer of property of the estate —
>
> (1) made after the commencement of the case; and
>
> (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

This Court has already found that William Fugazy's conduct represented a clear violation of Code § 549(a)(2)(B). The Consent Order dated September 10, 1987 was dispositive of William Fugazy's liability to Metromedia for improperly transferring the License during the bankruptcy proceeding. Once the bankruptcy petition is filed, a debtor may not transfer assets out of the ordinary course of business without court approval. See, 11 U.S.C. § 363.

Appendix J

The Consent Order signed by this Court on September 10, 1987, declared that the post-petition transfer of the License violated the automatic stay and was void *ab initio*. *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427, 431 (2nd Cir. 1987), *cert. denied*, __U.S. __, 108 S. Ct. 1596, 99 L.Ed.2d 910 (1989) ("Judge Brozman correctly held that Landlords termination notice violated the automatic stay . . . and was therefore void."); *In re Smith*, 876 F.2d 524, 526 (6th Cir. 1989); *Morgan Guaranty Trust Company of New York v. American Savings and Loan Association*, 804 F.2d 1487, 1490, *cert. denied*, 482 U.S. 929, 107 S. Ct. 3213, 96 L.Ed.2d 700 (1989). *Contra, Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989) ("We are persuaded that the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void."); *see, In re Albany Partners Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984); *In re Smith Corset Shops, Inc.*, 696 F.2d 971, 976 (1st Cir. 1982); *In re Matthews*, 739 F.2d 249, 251 (7th Cir. 1984). The undisputed liability of the transferor, William Fugazy, for the improper transfer of the License is thus a settled matter of the law of this case.

Further, § 549(a) of the Code clearly states that post-petition transfers of property of the estate are voidable by the trustee. This Court must therefore also determine the liability of Limousine and Roy Fugazy for the receipt and continued unauthorized use of the license. When they received the License, Roy Fugazy, on behalf of himself and Limousine, knew that the Debtor was involved in bankruptcy proceedings and was subject to the requirements of the Code. At the time the Debtor filed its petition, Roy Fugazy was the Vice President of Marketing, although he was dismissed shortly after the filing. He thus knowingly received and used the License and was possessed of full knowledge of the limitations imposed by the bankruptcy filing.

V. DAMAGES

At the time of the court-ordered sale of the License by the Trustee to plaintiff Metromedia, the License was property of the estate, although Limousine was using the License and was continuing to profit from it.[8] Section 550 of the Code states:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from —
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> >
> > (2) any immediate or mediate transferee of such initial transferee.

Section 550 clearly contemplates recovery not only of the physical asset itself, but also of the value derived from the asset. Code § 541(a)(6) specifically enumerates that the "estate is comprised of . . . [p]roceeds, product, offspring, rents, or profits of or from property of the estate."

Code § 362(h) states "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual

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8. Defendant's Answer, ¶ 18: "[R.D.F. Corp.] has earned income and derived profit from its (sic) license."

damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."[9] For there to be an act in contravention of § 362(h) of the Code there must first exist property of the estate. Here, Roy Fugazy and Limousine profited from the use of the License at least from the date of the attempted assignment from William Fugazy, and continued to do so even after the Consent Order was signed on September 10, 1987 which:

> ORDERED that R.D.F. Corp. [Limousine] acquired no legal or equitable rights or interests with respec to the F.C.C. License by virtue of said assignment and transfer by William D. Fugazy. . . .

This was in direct, willful contravention of § 362(a)(3) of the Code, and Roy and Limousine should be required to answer for their conduct pursuant to § 362(h).

The quantum of damages is to be measured by the gravity of the circumstances attendant to the unauthorized transfer and by the amount of unauthorized use by the debtor. In *In re Heafitz*, 85 Bankr. 274, 282 (Bankr. S.D.N.Y. 1988) the court considered the attorneys' degree of sophistication and familiarity with the broad application of the automatic stay, and concluded that "the debtor had acted with arrogant defiance of the law", and imposed attorneys' fees, costs, and punitive damages.

The case at bar presents serious misconduct by the Debtor

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9. For an extensive discussion of § 362(h), *See Maritime Asbestosis Legal Clinic v. LTV Steel Company, Inc.*, No. 89 Civ. 4304 (KC), slip. op. (S.D.N.Y. March 17, 1990). *See also, In re Crysen/Montenay Energy Co.*, No. 788, slip. op. (2nd Cir. May 9, 1990) (award of damages not warranted under special circu~stances of the case).

through its former Chairman together with connivance by a willing transferee in a less than arms-length transaction. The continued unwarranted use of an asset of the Debtor by the business of a son of the former Chairman makes sanctions appropriate in this case. Roy Fugazy's and Limousine's knowing and willful use of the License will result in damages being assessed against them including costs, attorneys' fees, and damages based on an accounting of the revenue received as a result of the unauthorized use of the License.

Although the Plaintiffs are entitled to the revenue derived from the unauthorized use of the License by Roy Fugazy and Limousine, the amount of that revenue has not been specified. The remedy of an accounting as provided under New York law is available where special circumstances are present warranting equitable relief in the interest of justice. *Grossman v. Laurence Handprints - N.J., Inc.*, 90 A.D.2d 95, 455 N.Y.S.2d 852 (2d Dept. 1982). Further, this remedy becomes available once the underlying rights has been established. *Kaminsky v. Kahn*, 23 A.D.2d 231, 240, 259 N.Y.S.2d 716 (1st Dept. 1965); *Wishman v. Genesee - Monroe Racing Assn., Inc.*, 43 A.D.2d 785, 394 N.Y.S.2d 1009 (4th Dept. 1973).

In the present case, the prerequisites for the remedy of an accounting under New York state law and Code §§ 362(h), 549 and 550 have been sufficiently proven. William Fugazy wrongfully assigned the License to his son's limousine business. The invalidity of the transfer has been established as well as the subsequent unauthorized use and profit from the License. Thus, Roy Fugazy and Limousine are to be held accountable for all revenue attributable to their use of the License. In the hearing conducted on October 27, 1987, this Court stated that the Trustee and Metromedia are both entitled to an accounting,[10] but noted a

10. Hearing Transcript, October 27, 1987 p. 21.

lack of specificity regarding the exact dates during which there must be an accounting. Accordingly, Roy Fugazy and Limousine are directed to file an accounting with this Court detailing all revenues attributable to their use of the License. They are required to account to the Trustee for revenue attributable to the License during the period from the date of their initial use through June 18, 1987 (the date of the Court-ordered auction), and the Trustee shall have judgment therefore. Roy Fugazy and Limousine are also required to account to Metromedia for revenue attributable to the License from the date of the auction to present, and Metromedia shall have judgment therefore.

While William Fugazy is not liable for any damages to Metromedia under the terms of the September 10, 1987 Consent Order, he has not been released from liability to the Trustee, and therefore, is required to pay one-third of the costs and atttorneys' fees of the Trustee relative to the License litigatior, through the date of the Consent Order. The balance of costs and attorneys' fees that the Plaintiffs incurred with respect to the proceedings in this Court involving the License shall be borne equally by Roy Fugazy and Limousine.

Although it might be appropriate under the circumstances to require the payment of further consequential damages in the form of costs and attorneys' fees incurred by Plaintiffs in the proceedings before the FCC, this Court has not been given any information as to the expenses, or time and effort expended in the administrative proceedings. Further the Plaintiffs voluntarily sought relief in that forum in addition to the pursuit of remedies sought in this forum. Accordingly no award for the costs and expenses incurred in the FCC proceedings shall be granted.

Appendix J

CONCLUSION

In accordance with the foregoing discussion, the Plaintiff's Cross-Motion for Summary Judgment is granted and the other Motions for Summary Judgment are denied.

Submit an Order, consistent with and implementing this decision.

Dated: New York, New York
May 14, 1990

s/ Burton R. Lifland
United States Bankruptcy Judge

APPENDIX K — STIPULATION AND ORDER DATED MAY 16, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

87 CIV. 2597 (RLC)

METROMEDIA COMPANY,

Plaintiff,

-against-

WILLIAM D. FUGAZY, TRAVELCO, INC., FUGAZY INTERNATIONAL CORPORATION and ROY D. FUGAZY,

Defendants and
Third-Party Plaintiffs,

-against-

JOHN W. KLUGE,

Third-Party Defendant.

89 Civ. 1185 (RLC)

METROMEDIA COMPANY,

Plaintiff,

-against-

WILLIAM D. FUGAZY, SR. and ROY D. FUGAZY,

Defendants.

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED to by and between the undersigned attorneys for the parties, that the above-

referenced actiors be and hereby are consolidated for purposes of pre-trial and trial, pursuant to Rule 42 of the Federal Rules of Civil Procedure, in that these actions involve common questions of law and fact and are pending in the same court. The consolidation of these actions would note the interest of the expediency and efficiency.

Dated: New York, New York
May 3, 1989

ANDERSON RUSSELL KILL &
OLICK, P.C.
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A Member of the Firm
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SO ORDERED:

s/ Robert L. Carter
UNITED STATES DISTRICT JUDGE (RLC)

APPENDIX L— CONSENT ORDER DATED SEPTEMBER 10, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
CHAPTER 7

Case No.
86 B 11206 (BRL)

In the matter of:

FUGAZY EXPRESS, INC.,

Debtor.

Adv. Pro. No. 87-5883A

ZACHARY SHIMER, Chapter 7 Trustee of FUGAZY EXPRESS INC., and METROMEDIA COMPANY,

Plaintiffs,

-against-

WILLIAM D. FUGAZY, FUGAZY LIMOUSINE LTD. f/k/a R.D.F. LIMOUSINE CORP. and ROY D. FUGAZY,

Defendants.

CONSENT ORDER

Upon the summons and complaint (the "Complaint") dated August 14, 1987 jointly filed by Zachary Shimer (the "Trustee"), Chapter 7 Trustee of Fugazy Express, Inc. (the "Debtor") and Metromedia Company ("Metromedia") and upon the acknowledgment and concession of William D. Fugazy, one of the above named defendants, that William D. Fugazy acted without authority in purportedly assigning and transferring the Debtor's interest in a certain Federal Communications Commission license

and permit known as Call Sign KXY610, (the "F.C.C. License") to Fugazy Limousine Ltd., f/k/a R.D.F. Limousine Corp. ("R.D.F. Corp.") and after due deliberation and good and sufficient cause appearing therefor, it is herby

ORDERED that the assignment and transfer of the FCC License by William D. Fugazy to R.D.F. Corp., is null and void and of no force and effect and it is further

ORDERED that R.D.F. Corp. acquired no legal or equitable rights or interests with respect to the F.C.C. License by virtue of said assignment and transfer by William D. Fugazy, and it is further

ORDERED that Metromedia and William D. Fugazy shall forthwith cause to be delivered a copy of this Order to the Federal Communications Commission ("F.C.C.") and shall each execute such documents and take whatever actions as are requested by the F.C.C. and as are necessary to effectuate the terms and provisions of this Order, and it is further

ORDERED that the Trustee be and hereby is authorized and directed to effectuate the sale of the F.C.C. License to Metromedia and execute such documents and take whatever actions as are necessary to comply with this Order, and it is further

ORDERED that William D. Fugazy be and hereby is directed to give seventy-two hour written notice to the Trustee and Metromedia of any applications, authorizations, assignments or other requests or filings made to the F.C.C. in connection with any F.C.C. licenses and permits previously issued to the Debtor; and it is further

ORDERED that except as set forth herein, the causes of action

asserted by Metromedia in the Complaint be and the same hereby are dismissed as to William D. Fugazy.

Dated: New York, New York
September 10, 1987

s/ Burton Lifland
United States Bankruptcy Judge

CONSENTED TO;
s/ William D. Fugazy
William D. Fugazy

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APPENDIX M — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution Article I, Section 8, Clause 4

Naturalization and Bankruptcy

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

United States Constitution Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the

Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; —between a State and Citizens of another State; — between citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[7]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

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7. This section has been affected by the Eleventh Amendment.

Appendix M

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Securities and Exchange Act of 1934, 15 U.S.C. § 78j

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Appendix M

Securities Act of 1933, 15 U.S.C. § 771(2) (1988)

§ 771. Civil liabilities arising in connection with prospectuses and communications

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph

> (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Appendix M

Wire Fraud, 18 U.S.C. § 1343 (1988)

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Mail Fraud, 18 U.S.C. § 1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than thirty years, or both.

Appendix M

Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.§ 1961 *et seq.*

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year: (B) any act which is indictable under any of the following provisions of title 18, United States Code; Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling

businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual,, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which

occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person had been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

RICO, 18 U.S.C. § 1962

§ 1962 Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their

accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against who it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of

the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter.

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to

safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to —

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation or forfeiture;

18 U.S.C. § 1963

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law —

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any —

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes —

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection 9a) for forfeiture under this section —

> (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or
>
> (B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that —
>
> (i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such

forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (*l*), no party claiming an interest in property subject to forfeiture under this section may —

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under tnis section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate and disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document,

record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice of any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, with a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of

such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant —

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

18 U.S.C. § 1964

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest,

direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. § 1965

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides is found, has an agent, or transacts his affairs.

APPENDIX N— FCC LETTER DATED OCTOBER 3, 1988

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

7320/L-2354

R.D.F. Limousine Corp.
555 Madison Avenue
New York, N.Y. 10023

In Re: Radio Section KXY-410

Gentlemen:

We have before us for consideration the above captioned station in the Taxicab Radio Service, a petition to revoke filed by Metromedia Company and numerous responsive pleadings.

The facts underlying these pleadings are undisputed. On July 8, 1986, Fugazy Express, Inc. filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. The company ceased operations on December 31,1986. On March 17, 1987, the Bankruptcy Court entered an Order removing Fugazy from the provisions of Chapter 11 of the Code and placing it under the involuntary provisions of Chapter 7 of the Code. A Trustee in Bankruptcy was appointed.

On January 29, 1987, R.D.F. Limousine Corp. filed an application requiring Commission approval of the assignment of KXY-410 from Fugazy to R.D.F. This assignment application was returned with a request for additional information., R.D.F.. resubmitted the application on April 15, 1987, after the Trustee had been appointed, correcting the problem noted in the original application. We consented to the assignment of the license, and a new license in the name of R.D.F. Limousine Corp. was issued on April 30, 1987.

Appendix N

On September 10, 1987, the Bankruptcy Court entered a Consent Order which held that "William D. Fugazy acted without authority in purportedly assigning and transferring the Debtor's interest in . . . Federal Communications Commission license . . . KXY-610 . . . to Fugazy Limousine Ltd., f/k/a (sic) R.D.F. Limousine . . . . As a result, the Court ordered that the assignment of the license was "null and void and of no force and effect," that R.D.F. "acquired no legal or equitable rights or interest" in the license and that Metromedia and William D. Fugazy should deliver a copy of the Consent Order to the Commission and take whatever actions were sacutary to carry out that Order.

While the rights and obligations of the various parties *vis-a-vis* each other may be somewhat complex, their obligations to the Commission are quite simple. Fugazy Express, Inc., licensee of record, assigned the license for KXY-610 to R.D.F. Limousine, who then became the licensee of record for our purposes. Information submitted to us, the Consent Order of the Bankruptcy Court in particular, casts doubt upon the validity of this transaction, and would under other circumstances require an administrative inquiry on our part. Here, however, the particular facts before us makes such actions unnecessary.

Affidavits submitted with the pleadings establish that KXY-610 ceased operations in December 1986. Under Section 90.157 of our Rules, 47 C.F.R. 90.157, the license for KXY-610 has therefore been cancelled and must be returned to the Commission. The frequency will than be made available for reassignment.

You may apply for a license as the frequencies formerly assigned to KXY-610 when they become available to the public. Any issues surrounding the assignment of the license to R.D.F. might,

however, become relevant to a decision concerning award of a new license to R.D.F.

Sincerely,

Richard J. Shiber
Chief, Land Mobile and Microwave
Divison

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